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FEDERAL PROTECTION OF INDIAN RESOURCES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST SESSION

ON

ADMINISTRATIVE PRACTICES AND PROCEDURES RELATING TO PROTECTION OF INDIAN NATURAL RESOURCES

PART 5

JANUARY 4, 1972

PHOENIX, SACATON, AND PARKER, ARIZ.

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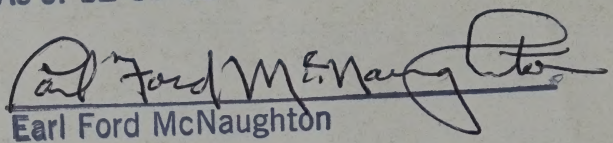

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ADMINISTRATIVE PRACTICES AND PROCEDURES IN RELATION TO PROTECTION OF INDIAN NATURAL RESOURCES

TUESDAY, JANUARY 4, 1972

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE
AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Gila River Reservation, Sacaton, Ariz.

The subcommittee met, pursuant to notice, at 11:15 a.m. at Sacaton, Ariz., Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Also present: Congressman Morris Udall; Tribal Governor Alexander Lewis; James Flug, chief counsel; Thomas Susman, assistant counsel; Henry Herlong, minority counsel.

Senator KENNEDY. The subcommittee will come to order. First of all, I want to say how appreciative I am to all of those who helped make these facilities available to the subcommittee, and also to extend a word of appreciation to your Congressman, Congressman Udall, who has been kind enough to be with us this morning.

We come to Gila River today in the interest of justice; justice for the first Americans, justice for those whose ancestors showed the white man the glories of living in the great western territory of our Nation, and justice for those who have endured generations of suffering, deprivation, and insult at the white man's hands.

To the Indian, land has always been the keystone of life. And in the American West, water is the absolute and ultimate catalyst for living on the land. Like oil and gold and silver, water is a scarce resource that has value to those who own it, those who use it, and those who want it. And so, over the two centuries of our history we have built a careful structure of rules around the rights to water. By law and by treaty, by judicial decisions and by regulations, we have settled who owns what water.

In the case of the Indians, we have recognized that their use of water resources not only predates the white man's use, but frequently predates the white man's laws themselves. Thus, under the *Winters* doctrine and other rules, we have guaranteed to the Indian people full access to the waters they need to make their lands fruitful and livable.

But in practice, the Indian people have not had the water they need or the water they are entitled to. They have seen Indian water diverted time and time again to non-Indian use. They have seen their water bring progress and prosperity to others, while they are relegated to a meager and marginal second-class existence.

The Indian is not opposed to non-Indian progress. But the Indian in entitled to be upset about non-Indian progress, using Indian

resources, at the expense of Indian progress. The Indian is not opposed to aiding the future development of Phoenix and Albuquerque. But the Indian wants the benefits of that development, if it is based on Indian resources, to accrue to his children as well as to the white man's children.

Just as the Indians resisted when their lands were taken from them by our forefathers by force, we can expect them to resist the theft of their resources by deceit and fraud, by arm twisting and blackmail, by half-truths and stealth, when these tactics are used by Government agencies and private developers to detach the Indian from his land and from his water.

Each time a reservation loses its lands or water in the name of "progress," the result is the end of our national recognition of the integrity of that reservation and its people. De facto, this is the very "termination" which the Government purports to oppose. And each time that happens, every American Indian will be justified in believing that once again the white man has broken his promise to the native American.

The facts are simple. The Indian people are not interlopers seeking to avail themselves of other people's water to farm new territory. They were here first, and both law and equity demand that they have first call on water, and not last call. They are entitled to sufficient water to meet their needs regardless of the competing desires of comparative newcomers.

But of course the ultimate fact is inconsistent with those facts. The Indians are not getting their water. And when we look to see why, we find that the very institution which is supposed to protect Indian rights is a party to the surrender of Indian rights. We find that the very people who are the trustees for Indian resources are allowing the trust property to be eroded. We find that the very agencies which the Indian tribes look to for information, advice, and help are participating in the destruction of the Indian birthright.

We are here to find out why and how this occurs. We are here to find out why the U.S. Government and its agents have allowed this to happen. And we are here to see that it stops, that Indians are treated as first-class citizens, that Indian rights are treated as first-class rights, and that Indian resources receive first-class protection.

I would like to ask Congressman Udall if he would like to make a brief statement.

Congressman UDALL. Senator, I am here most of the year and the Indians of Arizona get a chance to belabor us in the congressional delegation. It is a rare and distinct privilege for Arizona's Indians and their leaders to have a chance to talk to you, one of the most distinguished men in public life today.

So I am not going to take any time, except to make two very quick points. One, is that I am sure that you will reconfirm something you already know: That is, Indians are a big diverse group, with big, diverse problems. So people want to put Indians all in a pigeonhole and say, Indians want this and Indians want that.

We see a great diversity in our Arizona tribes, both in their attitude and outlooks, and particularly in the problems they have. Today I think you will find some different viewpoints than perhaps those you heard on the Navajo yesterday. So I am just delighted that one who is so pressed for time, devotes his limited time to all kinds of interna-

tional problems, to crucial national and domestic problems, a man who has taken a lead in the whole area of health insurance and health care for the American people, would find the time to come here to listen to the problems of some of the people I represent and the rest of us in Arizona represent.

Then, finally, let me say one thing to the people here who want to participate. I think this is something that the Senator cannot say because he is too much of a gentleman. You really cannot win when you arrange one of these trips, when you have enough concern about Indian problems to take your time to do anything about it even if you go to only two reservations. Some will say, "Why didn't he come here."

When you schedule such a hectic trip, you are limited in time. Already there is a room over in Parker, 300 miles from here, where people are gathering to be heard this afternoon. The fact is, we have precious moments here, maybe an hour or so in which all these hundreds of people here have to be heard.

So I would suggest a couple of things to those people who are here. One is, be brief, summarize your points. This is a golden opportunity to give your views to a man with real influence and real pride in your country. Summarize them, and hit the high points.

Second, I am sure he will point out to you, that under the Senate procedures there will be ways where your written statements, your points that you would like to make and you do not get a chance to make today, can be heard for the record. They will be studied by other Senators who serve on his subcommittee.

So, Senator Kennedy, it is a source of great pride for me to be here this morning and I will sit back and listen to you.

Senator KENNEDY. Thank you very much.

Congressman UDALL. You can continue with your hearing and I will sit here and listen.

Senator KENNEDY. Well, I want to say again, Congressman Udall, thank you. We have, I believe, some 9 witnesses and we have about an hour and 20 minutes, or perhaps an hour and a half. What we would like to do, Congressman Udall, is have all the statements printed in the record and ask each of the witnesses to summarize. Then in the last 15 or 20 minutes. we will open the hearing to brief comments from the audience.

In the meantime, those of you who wish to comment later should indicate their names on the pad on the table to my right. Try to limit your statements to 2 or 3 minutes. We will do the best we can to hear from anyone here who wants to make a comment. However it will be extremely brief. If you want to expand or develop your thoughts at a later time, that will be fine. We will make them part of the printed record.

Governor Lewis of the Gila River Reservation is here at the table with us and will introduce the first witnesses.

Governor LEWIS. Senator Kennedy, on behalf of the Gila River Indian community, I wish to extend a hearty welcome to all of you. We are fortunate to have an opportunity of having the man here on our reservation. At this time I would like to introduce our people who will be testifying.

The first is former Governor Allison, the second one will be the chairman of the Gila River Water Commission Conservation Com-

mittee, Mr. Evans. Then Mr. Jay Marago, Jr., our former Governor, and then Lieutenant Governor Antone. And they will testify in accordance with your introduction.

STATEMENTS OF LOYDE ALLISON, EDISON EVANS, JAY MARAGO, JR., AND DON ANTONE

Mr. ALLISON. Senator Kennedy, Congressman Udall, ladies and gentlemen: We are running on Indian time and I'm glad we are doing that. I might bring you back years and say that I'm one of the men that was raised and brought up here, and have seen the Gila River when it had water. And as years went on this has diminished to nothing as you seen it when you crossed it. During this time there has been a severe starvation of Pima people, not only Pima people, but Maricopa people, on account of our guardian not protecting our rights. This is the reason.

When you go back before my time, read in history that the Gila River was one of the richest parts of the country which supplied travelers going through here. Also the time when the armies were having engagements all through our country and were supplied many of the things that they needed to survive. And the Pima people have always given protection to different peoples. That's why they came to this southern part of the country.

And I think as we come along up to the present time, the Coolidge Reservoir was built for us. The Indian people at that time thought that we had the structure here that would supply our needs. But at the same time we know that probably about 50,000 acres or so could be supplied.

But during this time, this Gila River decree came into being, and part of that right was taken. So we're at the present time in worse shape, I think than we were when the Coolidge Dam was built. So we're looking to other means to survive here. Thank you.

Senator KENNEDY. Let me just ask you whether you think that your tribe is getting all of the water that it is assured of under the Winters doctrine?

Mr. ALLISON. No, sir.

Senator KENNEDY. Why don't you? Is there some intervening decree established?

Mr. ALLISON. Yes. I think there are things that I couldn't myself put a finger on. There might be several things.

Senator KENNEDY. Well, did the Gila River decree limit the amount of water which would be available to the tribe?

Mr. ALLISON. Well, in the beginning when the act was made, the right was given the Indian people, but it limited——

Senator KENNEDY. Limited that right?

Mr. ALLISON. Yes; limited that right.

Senator KENNEDY. In the formulation of that decree, who represented your interest?

Mr. ALLISON. During the hearing in Tucson, as I understand it, there were four Indian people that went over. There was an attorney by the name of Matthew.

Senator KENNEDY. Wasn't the Justice Department representing the tribe and attempting to get this decree?

Mr. ALLISON. Yes.

Senator KENNEDY. Thus the Justice Department was trying to live up to its responsibilities and properly protect the Indian water right. Now, as I understand it, the Bureau of Reclamation is on the other side?

Mr. ALLISON. The point I want to put across, is that the people that went weren't allowed in the hearing room.

Senator KENNEDY. Well, as I understand it, the other side was the Bureau of Reclamation and they were also represented by the Justice Department?

Mr. ALLISON. Right.

Senator KENNEDY. You had a conflict, obviously. The Justice Department, which is charged to protect Indian rights on the one hand, and on the other hand representing the Bureau of Reclamation. So you had them serving two masters, so to speak?

Mr. ALLISON. Right.

Senator KENNEDY. In this particular instance I, and I wish you would help clarify it for me, the decree that was issued limited Indian water rights. Is that true?

Mr. ALLISON. That is true.

Senator KENNEDY. Did you feel that the Justice Department at that time was really representing you to the best degree possible? Or do the results of this put some rather heavy question in your mind about an inherent conflict which makes it extremely difficult in a circumstance like this for the Justice Department to really represent your interest?

Mr. ALLISON. Well, as I said, we were not allowed to go into the hearing room. That makes me feel that we were not really represented.

Senator KENNEDY. Who was in the hearing room?

Mr. ALLISON. I don't know; this was way back now.

Senator KENNEDY. They were deciding your water rights in that hearing room?

Mr. ALLISON. Right.

Senator KENNEDY. You or your representatives were not in the room?

Mr. ALLISON. No.

Senator KENNEDY. What was the result of that? Was it a limited result?

Mr. ALLISON. It was a limited result.

Senator KENNEDY. Thank you very much. We will now hear from Mr. Evans.

Mr. EVANS. Senator Kennedy, Congressman Udall and other distinguished guests and ladies and gentlemen.

Problems exist on the irrigation project now. Adequate water from the San Carlos Reservoir was not available other than in 1941, 1942 and 1966 and 1967. In other years there was never enough water there to take care of the needs for agriculture. It's always been critical, sometime acute. Its very bad. This has been happening and our water table has declined to a great extent because of heavy pumping here and in the surrounding area.

In some cases the salt is so great that the water is not fit for irrigation use. The land under the San Carlos project has been only partially subrogated, a very small part of it, and the land needs improvements. Development is needed and additional water is needed for this development. This has been the problem there. Also, there have never been sufficient funds to take care of the maintenance part of the project.

A lot of silt has been deposited in the canals from the rivers and the washes, which was dumped into the river below Coolidge Dam. This has also caused an extra burden to the project. Also, there are factories on the land and airstrips too. Also the small land allotment is not economical to a farmer as a unit. These cannot receive water at times also. This has been the problem right along. And also our system is primitive. Our canals have not been lined. So therefore a lot of water has been lost by seepage from transporting water on this kind of canal.

Approximately half of the water has been lost before it reaches the field or the plant. Now these are just a few of the problems. There are a lot of others that I could have mentioned, but this is all I can mention now. Thank you.

Senator KENNEDY. Thank you very much.

Mr. EVANS. There might be some possible solutions. I call to Mr. Marago to elaborate on these.

Senator KENNEDY. Mr. Marago.

Mr. MARAGO, JR. Senator Kennedy, Congressman Udall, and fellow tribesmen. As just mentioned, we do have an existing system constructed and administered by the Bureau of Indian Affairs. It is one of the most primitive systems in the Southwest. One of the major attempts for solutions is the central Arizona project. The irrigation water supply comes from Coolidge Dam, 90 miles away from this reservation, and structures divert water released from Coolidge Dam to our dry acres here.

The silt problem is one of the roughest that we have to contend with. With surplus equipment that is outmoded, the Indian works of the San Carlos project, administered through the Pima land operation, much money is needed to keep it in operational condition to desilt and maintain the present structures as they exist. Moneys have been asked for and planned for.

This may be typical of all the tribes in the State of Arizona, at least in working with the Bureau of Indian Affairs. The two tribes on this reservation began a program of their own to utilize the Bureau of Indian Affairs and its resources. We don't have the engineers, and we don't have the technical people. We have been successful in calling upon the Bureau of Indian Affairs for this type of help. More can be done, as far as cooperation is concerned, with this dilapidated system that we have.

The second major solution within the realm of the Central Arizona project, is Buttes Dam. Buttes Dam has been talked of and worked for a great many years now. Out of a total San Carlos irrigation project comprising 100,000 acres, some 50,000 acres, supposedly, of Indian land, is irrigated at present. Moneys have been asked to rehabilitate and to keep our machinery going in working condition. Recently, and this could be a few years ago, a proposed budget was submitted. But then it is out of the hands of even the Bureau of Indian Affairs, and most likely the Department of Interior as well.

How do we get into the Office of the Bureau of Management? They have some reason for cutting moneys that could really do some good for people, much less the two tribes upon this reservation, who want to pull their ownselves up by their own bootstraps. Buttes Dam would desilt. It would regulate not only from the Coolidge Dam 90 miles away, but from the San Pedro River coming clear out of Mexico.

We face another silt problem that is really a toughy. That silt coming from the San Pedro and its watersheds, not only clogs up our system, our structures, and our ditches, but it also sometimes deposits salt. But the desilting behind Buttes Dam would really lay down and even out a cost problem that we feel exists here on this reservation. I thank you.

Senator KENNEDY. Thank you. Very good statement. Now Mr. Antone.

Mr. ANTONE. Senator, I will attempt to summarize what has been brought out to you this morning, real briefly, and I'll also attempt to state our position as far as the Central Arizona project is concerned. It is a major part of our future plans and what we hope to obtain from it. It was mentioned that back at the time of the first contact with the white man in 1694, the Pimas had another system on canal irrigation. The exclusive and extensive ditch system derived water from the dam on the Gila River. The Pima economy leaped forward as wheat and livestock technology were introduced by the Spaniards.

By 1861 the Pimas were able to sell quantities of wheat, corn, beans, and other things to the U.S. War Department for use at Fort Breckinridge. The tribe had profitably extended into the world of commercial production, but this period of Indian prosperity was not to last. Around 1890, with the heavy water diversions practiced upstream, critical water shortage developed for the Pimas. By 1895 the Pima economy situation had changed so drastically that wheat was being brought in and distributed as rations to the Pimas. The Pimas for the first time had tasted what it felt like to be given a handout.

In the 1914's and up to 1921 the Government attempted a solution to the Pima problem through the allotment program. You heard some of the problems at the time by some of the people here who were living at the time and had faced those very problems. In the 1930's it was mentioned that Coolidge Dam was erected. It was then felt that enough water would be reserved, and would be of use to the Pima people here on the reservation.

Some 50,000 acres of Indian land was irrigable and the project was also responsible for irrigating the same acreage of non-Indian land in the nearby area. However, several problems arose from that. As an example, each Indian was allowed to have 10 of his alloted acres irrigated. However, in the 1914–21 allotment program, this program had not considered a system of water distribution.

As a result, a massive Indian land exchange program was necessary. Furthermore, some of the tentatively included land was unusable for agriculture, and the boundaries of the project had to be adjusted to allow for this. When the project finally got underway, irrigated acreage was concentrated on the eastern half of the reservation, leaving the western half relatively unchanged. So you can see, Senator, we do have problems. We have had problems, we still have problems, and plans that will better our way of living.

As far as central Arizona project is concerned, this tribe is in full support of the project, As you can see, this tribe has been one tribe that has planned and has worked on this way before anyone else, including the State; before the State ever dreamed or talked about central Arizona project. This is one of the things that we have in

our programs. We will continue to work on it, to help support this project.

We know that the Colorado River tribes have fears, and have different and mixed feelings about the central Arizona project. We know that they are opposing the project. However, we do support them in their water rights. We do support them in their efforts to obtain more funds, construct more projects and to develop more areas, so that they can best utilize what water they have under their Supreme Court ruling.

We do support them, and I think I can speak for all the tribes here in the central area. We all feel that we will unite to support them in every effort that they take to try to develop more acreage over there, so that they can best use their water rights.

However, I think more efforts ought to be taken to have a better understanding between all tribes here in this State, so that we can all best use the water available to us at present, and, so that we can all best plan for what is coming up in the future and all have a better understanding. That goes for the State as well as for the Indians within the State.

Well, Senator, we will follow up with some more reports to try to educate you as to what type of plans we have for the future, so that you can stay in our corner, as you have for years. We certainly appreciate that. Thank you very much.

Senator KENNEDY. Thank you very much. I understand that you supported the central Arizona project. Do you have some assurances that your tribe will share in the water that comes into central Arizona as a result of the project?

Mr. ANTONE. I think we're in the same boat as anyone else. We have no assurance of any kind on paper. We do have the word of the Secretary. He said to our former Governor Allison that he will see to it that we get our fair share, and that he'll see to it that we have our say on central Arizona project and how much apportionment we might be able to get. This, we feel, is the only word that we do have. We can't call it guarantee.

Senator KENNEDY. Would you feel better if you were able to get that in writing or some definite kind of assurance?

Mr. ANTONE. I certainly would.

Senator KENNEDY. Various Secretaries come and go.

Mr. ANTONE. We certainly would.

Governor LEWIS. We had a distinguished one, the distinguished brother of our Congressman who served with President Kennedy. Some go faster than others.

Senator KENNEDY. But I am interested in this. I want to know whether the tribe is satisfied with just this verbal kind of commitment?

Mr. ANTONE. We won't be satisfied, Senator, until we do get some kind of agreement or some kind of an assurance that we'll get our fair share of the project.

Senator KENNEDY. OK. Thank you very much, gentlemen.

Mr. ALLISON. Senator Kennedy, the State has a computer so we can ride along with them, put in whatever we can, and whatever comes out of it, that's what our hopes are on.

Senator KENNEDY. I see, fine. Thank you very much. Mr. Sprawls from the Akchin Reservation. We have got eight more witnesses and

45 minutes. So this is, unfortunately, the problem. Then we will have a period open to the floor. I will raise a friendly pencil about that time.

(The following report on the Gila River Indian Reservation's needs for an adequate water supply was subsequently submitted to the subcommittee by Governor Lewis:)

FUTURE NEEDS FOR AGRICULTURE DEVELOPMENT

The agricultural potential of the Gila River Indian Reservation must be developed. The future of the Gila River people will largely depend on a strong agricultural base. The Pimas are traditionally farmers, and their farm land is their greatest resource.

Of the 372,000 acres comprising the Gila River Indian Reservation, there are 130,546 acres of prime agriculture land which will be able to support an ever increasing population, and consists of several categories of land needing rehabilitation, development or both.

The 50,546 acres within the San Carlos Irrigation Project has, from its inception, been plagued with insufficient water and funds to properly utilize the available supply. This project can become totally productive, only through the importation of Central Arizona Project Water.

The fluctuating storage supplies, insufficient number of wells for supplemental water and lack of properly subjugated land has reduced the Indian Works portion of the San Carlos Irrigation Project to a state of poverty.

A rehabilitation plan has been started, largely through financial support of the Model Cities Program, and additional funds of the B.I.A. The plan will be the first step in determining overall rehabilitation needs and agriculture development planning for the Reservation. The plan will be based directly on the allocation of Central Arizona Project water to the Reservation.

A preliminary report of needs has been compiled and presented as supporting evidence for the "Expression of Interest in Project Water", which was forwarded to the Secretary of Interior indicating the requirement of the Indian Reservation for supplemental Colorado River water. The Indian people have been assured by the Secretary of the Interior that their request for Central Arizona Project will be given fair consideration.

Funds to completely rehabilitate the San Carlos Irrigation Project must be obtained and actual work started, regardless of Central Arizona Project allocation in order to utilize and conserve the supplies of water presently available. There is very little time to complete the rehabilitation and additional development of Gila River lands.

Outside of the San Carlos Irrigation Project large development leases and two other small irrigation projects total approximately 25,000 acres. These lands must have Central Arizona Project water delivered to stabilize their economy and to dilute the ever increasing salt content of the present underground water supplies.

The third category of land proposed for development will be entirely dependent on the allocation of Central Arizona Project water is a potential of 55,000 acres of excellent desert land. This acreage, when subjugated, will improve the resource base on the Reservation and further the economic independence of the Pima Indian people.

In depth planning and cost estimates cannot be satisfactorily made until funds are available for inventory purposes and completion of the proposed allocations of Central Arizona Project water upon which to base planning.

The three categories of reservation agricultural development:

1. San Carlos Irrigation Project
2. Other developed non-project land and
3. The development of 55,000 acres of new land are so complex that only a general approximation of costs involved can be made.

Rehabilitation costs for the Indian Works Project of 50,546 acres and not including any main canals and laterals would approximate $250 per acre. This would include the farm land only to bring it up to present day irrigated land standards.

The two smaller irrigation projects and other developed farm land outside of the San Carlos Project would approximate these same costs.

Land development cost for any new land development, not including delivery canals and laterals, would approximate $350 per acre. Total agriculture rehabilitation cost on 75,546 acres would approximate $18,800,000, while development cost

on 55,000 acres of new land, without main delivery systems, will approximate $19,250,000. This indicates needs of $38,050,000 for total agriculture development on this Reservation. This kind of development can only materialize on the allocation of an adequate supply of Central Arizona Project water.

Paramount to all development on the Reservation, is the ultimate completion and upgrading of the San Carlos Irrigation Project (Indian Works) as this project has decreed water rights, supplemental underground water supplies and finally the guarantee of Central Arizona Project water which will assure future continued economic prosperity for Gila River Indian people.

It is of the greatest concern to the Indian people that their land, irrigation project and all its retaining works, were put in to help provide a stable water supply and to re-establish for Indian use, the supply which had been usurped by upstream appropriation. This has not come about. The constant shortage of water, the complex farm programs, the complicated legal issues on water rights have all contributed to the present deplorable condition of the Indian farmer and his land. The Indian people need help in preparing their land resources to supply their needs of economic stability.

The Gila River Indian Community supports the Central Arizona Project. It is essential to the future of the Pima and Maricopa people.

The Gila River Indian Community fully supports the position that Water Rights of Indian Reservations affected by Central Arizona Project must be adequately protected. They support adequate fundings so that irrigable lands of both the Central Arizona Reservations and Colorado River Reservations can be adequately developed.

The Gila River Indian Community believes that Indian unity must be preserved at all costs.

The Gila River Indian Community appreciates the attitude of the Secretary of the Interior in his willingness to assure fair allocation of water to us.

We also appreciate the concern of Senator Kennedy and his subcommittee in helping us obtain adequate allocations of water and adequate future guarantees of this water. Also his support for Indian Water rights.

At this time, the Indian people of the Gila River Indian Reservation are not realizing the economic potential of their land. There are presently 75,000 acres of irrigable land on the Reservation. Of this amount, the San Carlos Irrigation Project has a decreed water right of 50,546 acres and the Gila Crossing area has a right containing 2,992.5 acres. These are under the Gila Decree (Globe Equity 59) with water sources in the Gila River. A total of 1,080 acres at Maricopa Colony have decreed rights in the Salt River. The Gila River Indian Community does not recognize the limitations of these decrees.

Twenty-one thousand acres of developed desert farm land also contributes toward the Indian income on the Reservation through long term leasing. These lands have developed underground water supplies.

By far the most important resource on the Reservation is the San Carlos Irrigation Project (Indian Works). Since its inception, it has suffered immeasurably from continued drought and lack of funding for operation and maintenance plus completion of its subjugation. When Coolidge Dam was completed it was estimated that 300,000 acre feet has been available for release. Actually only about 180,000 feet has been available on an average year. Only for a short period, after the heavy precipitation in 1941–42, and again in 1966–68, was there sufficient water to allow normal farm operation. The continued drought and resultant water shortages in between these periods have allowed only some 17,000 acres to be farmed on the average. Many acres have completely reverted to brush and desert and are incapable of projection without re-subjugation.

Of the decreed right land in the San Carlos Project 8619 acres were never subjugated. Thus, this could not be farmed and 30 years of income has been lost on this land. Only 15,000 to 20,000 acres were adequately subjugated leaving approximately 20,000 acres of original Indian farm land only partially developed. This must be developed in order to properly utilize the available water. In addition, a stable water and adequate water supply is essential for the entire 50,546 acres if enough farm land is to produce at potential.

To illustrate the problem of inadequate water supply, in 1971 there was an apportionment of seven-tenths (.7) of an acre foot per acre. The planting on the 12,000 acre Tribal farm in 1971 was limited to about 3,000 acres. Even this acreage could not adequately be supplied with water due to the fact the San Carlos Reservoir was dry and pumps could not supply adequate water for the farm. Some growing crops were damaged due to the lack of water, as a result, they were unable to pay their O & M charge of $99,458. The superintendent has requested

the O & M charge be deferred and requested a supplemental appropriation to make funds available for use on the O & M Program.

In 1970, only 40 percent (17,000 acres) of irrigable land was farmed on the San Carlos Irrigation Project, while on the 21,000 acres of pump developed land, 72 percent was farmed. This indicates the cropping potential with a stable water supply. Even with this water supply, it is being depleted through the continual lowering of the underground water table.

Gross farm income on the Reservation amounted to 6 million dollars for 1971. The gross farm income potential is estimated at 37 million dolars yearly if all potential agricultural land is developed.

Funds have been requested yearly for project rehabilitation on all projects on this Reservation.

Budget request of $1.5 million were made by the B.I.A. for FY 1973–74 to initiate subjugation and rehabilitation of Indian farm land.

The Joint Works portion of the San Carlos Irrigation Project obtained supplemental funding of $500,000 for well rehabilitation in 1970 which has helped in preventing larger crop losses this last year.

Irrigation O & M rates have been very low since the San Carlos Irrigation Project has started. This has resulted in less maintenance work completed and inability of the project to stay abreast of present day standards. The unstable water supply has directly contributed to these undeveloped conditions of the project and its inability to sustain economic returns.

Water quality also is of great concern and in areas of underground pumping, salt content is increasing as water tables lower. Some areas now are extremely marginal, due to salinity and only through special practices can cropping be continued.

STATEMENT OF WAYNE SPRAWLS AND KAY CARLOCK, AKCHIN RESERVATION

Mr. SPRAWLS. Senator, I am the farm manager of Akchin. I'm familiar with the problem, or maybe a little bit more of a bigmouth, so they want me to report.

Senator KENNEDY. Right.

Mr. SPRAWLS. Akchin is a small reservation south of the Gila River here. About 1890 these people were migrating Papagos and they settled into this wash and that's the way they farmed. They got their farming from the Pimas. So the Papagos were primarily a farming people. Then in 1953, or about that time, they subrogated about 12,000 acres of land under leases, but in 1960 they took over this farm themselves and hired me to manage it. This has been a very successful farming operation due to the whole economic structure of the tribe, and it's very adequate.

But from 1953 until now farmable land is down to 5,000 acres because the water table has dropped from 100 feet to 550 feet. Our water costs are going up approximately 10 to 15 percent a year.

So we do have problems and we definitely need a supplemental water supply. It seems that our only chance to maintain our economy is the Central Arizonia project. And it seems to me it would be a shame if we didn't get some kind of supplemental water from the Central Arizona project, or other means because these people have asked nothing.

They took their own initiative and made a successful reservation. They have asked for and received very little from the Government and right now they're self-sufficient. But if they do not get water, they will not be within the next 5 to 10 years.

Senator KENNEDY. Do you know if the *Winters* doctrine applies to ground water? I understand it may not apply by court decision but probably is applicable. You say the water table has dropped from 100

to 550 feet from 1953 to the present. Now, has that been by some act of nature or an act of God?

Mr. SPRAWS. An act of our farming.

Senator KENNEDY. So it is not a result of overutilization by the tribe, is that right?

Mr. SPRAWLS. That's correct.

Senator KENNEDY. I mean, you are not suddenly using more water now than you were in 1953?

Mr. SPRAWLS. Well, as our farm increased, we're using more, but now we're going down the other way.

Senator KENNEDY. But in terms of total acreage which is being farmed, how has that varied since 1953?

Mr. SPRAWLS. 12,000.

Senator KENNEDY. So, actually, the amount of irrigated land has been reduced, is that correct?

Mr. SPRAWLS. Senator, this is what the most important part of our living conditions rely on. If we don't get auxiliary water from somewhere else we are going to be wiped out, in a sense.

Senator KENNEDY. The reason that this table has dropped, has not been because either the water has been wasted by the tribe or by any act of God. It has been because, as I understand what you said, the water is being used by farmers in the neighboring communities?

Mr. SPRAWLS. That is correct.

Senator KENNEDY. All right. Now, at any time, Mr. Sprawls, since you have been there—excuse me, what is your name, please?

Mrs. CARLOCK. Mrs. Kay Carlock.

Senator KENNEDY. Did the Bureau of Indian Affairs or the Justice Department visit your tribe to try and find ways in which the water which you have been using for years can be preserved?

Has anybody come in and said:

> We understand that the water is down, that we are charged under a treaty or decree to protect Indian water and, therefore, we would like to work with you in helping to insure that that water table will not go down.

Has the Bureau of Indian Affairs ever tried to work with you in that way?

Mrs. CARLOCK. If they did, they didn't find any way.

Senator KENNEDY. They did not what?

Mrs. CARLOCK. They didn't find a solution.

Senator KENNEDY. No; but did they ever come and try, did they ever come to you and say, "You have obviously got a problem"?

Your rights must be inherent in the establishment of the reservation, it should be understood that there must be certain water guarantees. Otherwise it would be rather meaningless to put people on the reservation. What I am interested in is whether the Justice Department or the Bureau of Indian Affairs has ever come to your tribe, sat down with you, and tried to find out ways—by going to court or other means—to protect your water table and your rights.

Mrs. CARLOCK. No.

Mr. SPRAWLS. Senator, as far as I know, I can say this: We have no records before 1961, since we were organized then under the Indian Reorganization Act. If there was an effort, I guess it was before that. But as far as I can remember, there has been none.

Senator KENNEDY. And the water table is going down, is that right? Is it going down every year?

Mrs. CARLOCK. Oh, definitely.

Senator KENNEDY. The Federal Government has the responsibility to help and assist you. Have you not heard from them, or have you ever tried to go to them? For example, go to the U.S. Attorney or the BIA and say, "Can't you help us protect our water rights?"

Mrs. CARLOCK. We are trying with the CAP. That's our only hope. There's nothing else.

Mr. SPRAWLS. Senator, on that point you are bringing in, let me say we went to the archives, and the BIA has not been protecting the Indian water rights as our case in the Claims Commission will show. They have tried for many years to get farming going down there and pump some wells, but assistance from the BIA was very unsuccessful since 1953.

I will give you an example. What happens is that sometimes when you ask for something it may take 10 years.

Senator KENNEDY. Where will that water table be in 10 years?

Mr. SPRAWLS. Now, Senator, around 500 to 600 feet is the break-even point for commercially pumping water. So within 10 years, at 20-foot declines a year, these people will be out of the farming business.

Mrs. CARLOCK. We'll be on welfare or something.

Mr. SPRAWLS. I mean, this is the truth. I mean, they're highly successful now.

Senator KENNEDY. Earning their own living, supporting their families?

Mr. SPRAWLS. Right.

Senator KENNEDY. This is what you want to continue to do?

Mrs. CARLOCK. We would like to.

Senator KENNEDY. The Federal Government is charged with the responsibility to protect those water rights and you have not heard from them?

Mr. SPRAWLS. Here's what happened: We put in an application for water mains in the village down there, and I didn't even have any idea what happened until I almost got into a fight with one of the Government employees, asking for a trencher. That's the only way I found out that there was an application. It took them 3 weeks to get the money for us. This is the sort of thing that happens when you try to ask for something. They'll delay it some way until you finally have to go some other route to actually find out.

Senator KENNEDY. I see. Thank you very much.

Mrs. CARLOCK. We certainly thank you for listening to our problems. Thank you Mr. Chairman and everybody.

Senator KENNEDY. Mr. Sprawls, I am going to try to find out why the Secretary of the Interior and the Attorney General and have not come to your aid. We will ask why they have not proceeded on this matter. We will follow it up when we get back. Now, Mr. Smith from Salt River.

STATEMENT OF PAUL SMITH, SALT RIVER RESERVATION

Mr. SMITH. Senator Kennedy, Congressman Udall——

Senator KENNEDY. We want to do our best on the 5-minute rule.

Mr. SMITH. All right. On behalf of the Salt River community I would like to thank you for the opportunity to present some of the

problems that we have in our community. As you already noticed, even though all the tribes in central Arizona might belong to the same group, or be the same types of people, we all have specific problems. We have two at Salt River. I'll try to make everything as brief as possible and cut down on my opening statements.

But I would like to say that the items that have been discussed mainly have been water rights. Also, the rights that the Indians have as far as boundary problems that are already in existence. In going back a little bit, Mr. Antone, the Lieutenant Governor from Gila River mentioned that long before any non-Indians came into the Salt River Valley, or into what we know now as Arizona, the Pima-Maricopa people were here farming.

They had developed an irrigation system, and some of the old irrigation ditches are still in existence in the Salt River community. The Pimas and Maricopas knew how to develop their lands, They knew knew how to farm. They have always been farmers and they have always been a peaceful-type people.

As the non-Indian people came into the Salt River Valley and the Gila Valley, the non-Indians gained much help from the tribes that were in the area. In that the Indian people showed these non-Indians how they could exist on the desert where there was no water.

They taught them how to use the water and how they could exist on the desert without water. Our ancestors have always heldped the non-Indian people that have come into what we now know as the State of Arizona. Without us I feel that it would be very difficult for the State to have been settled.

Now, once again, a non-Indian community is calling upon the Indians once again to help once again, this being with the central Arizona project. We realize waters that will be used for the central Arizona project might possibly infringe upon the rights that have been decreed to the Indians. The Salt River community is also in support of the central Arizona project.

We do not have any guarantees as to how much water we'll receive. We do know that if the central Arizona project is built, much of the dame itself will be placed upon the Salt River Indian community.

As you look around the United States, the major dams that have been built by the Bureau of Reclamation are on Indian reservations. At this point we realize that with construction of the dams, much of our lands will be utilized for non-Indians.

The proposed Rio Solado project will take land from the Salt River community. The waters behind the dam will cover part of the Salt River community. As I mentioned just a few minutes ago, the Salt River community is in agreement with the construction of the dam. However, there are some things that I'd like to present to you in our behalf. With the waters covering up portions of our land from the proposed Rio Solado project, we are asking for a land exchange for the Indian lands that will be use in the Salt River community. We would like to make a land exchange with the Department of Agriculture or the Tonto National Forest. We would seek some money, but our land is much more important to us at this time than a few dollars and cents. The biggest problem that all Indians have is maintaining their land base, and that is what we're attempting to do.

Also, we have boundary problems. If this Rio Solado project is to be, we have to have definite boundaries where we're to be located. We

have to know exactly how much land is going to be taken from us. For this reason, we would like to have the southern boundary of our community more firmly established.

We just received word from Assistant Secretary Loesch, that the boundary of the Salt River will be based on the floodwaters of 1965 and 1966, at which time water was backed up in the various dams upstream. The Salt River bed is dry now and it is usually dry the biggest portion of all the years. In this one particular case, when the waters came, the dams became full and they let the water out. There was quite a bit of water and for the first time in my life, I had seen the Salt River flowing from bank to bank.

And I'm sure that this is the way it was before. We do present these things to you for your consideration to take back to your colleagues back in the Senate. We also have any number of trespass problems from sand and gravel operators along our boundary lines, so that we definitely need to have our boundary established. We are making application for additional water to develop irrigable lands which presently do not have any water rights. We only have approximately 12,000 acres out of a total of 46,000 acres of ground that actually has water rights. With the proposed central Arizona project we are hoping that with the water that we receive we'll be able to develop these undeveloped lands that we have now; that we'll put these lands into agriculture and continue farming as we have in the past.

Senator KENNEDY. What is the basis of your optimism? In the examples you have given us, the Federal Government failed to live up to its responsibility in protecting your water rights. Why are you so sure that you are going to get a better deal now because of the central Arizona project?

Mr. SMITH. I'm not saying that we're sure. I don't think anybody is really sure of what they're going to get from the central Arizona project. But by making some of our wishes known before anything is done, possibly they'll hear us somewhere and give us what we're asking for.

Senator KENNEDY. What has been the history of Indians making their wishes and desires known to various Government officials in the past. What has been the track record?

Mr. SMITH. Well, I think we are running in last place as far as track record. We make wishes known but they only go as far as an associate deputy, or somewhere down the line and it stops there. It never reaches the Secretary. It might never reach the Congress or the Senate. Somewhere along the line our wishes are not heard, or if it is heard, it might be ignored. For what reason, I don't know.

Senator KENNEDY. It really is not such a mystery why they are not heard, is it?

Mr. SMITH. No, I don't think so. When the non-Indian people want something they're going to get it regardless of what people they hurt, or what land they take. They're going to get what they want. And unless we make a stand now as Indians in the State of Arizona and throughout the United States, this is going to continue to happen.

Senator KENNEDY. That is why I am just listening to the comments now and earlier. The tribes feel that they are going to share in the water from the Central Arizona project and are optimistic.

Mr. SMITH. We are hoping and attempting that somehow we can get a guarantee that we will receive a certain percentage of that

water, because we feel that it rightfully belongs to us. At the same time we are not of the type of people that are unwilling to share with one another; whereas some of our neighbors across the boundaries do not wish to share with us. We have always shared what we had with the non-Indians. Hopefully, we will still have that attitude, and that non-Indian people will share some of the things that they have with us.

Senator KENNEDY. Alright thank you very much.

Mr. SMITH. Thank you for takling to me.

(A letter from the Secretary of the Interior to the president of the Salt River Council Dec. 26, 1968, concerning relations between Salt River and Interior in construction of Orme Dam, follows:)

THE SECRETARY OF THE INTERIOR,
December 26, 1968.

Mr. FILMORE CARLOS,
President, Salt River Pima-Maricopa Indian Community Council,
Scottsdale, Ariz.

DEAR MR. CARLOS: On September 23, representatives of the Salt River Pima-Maricopa Indian Community met with me and proposed an exchange of correspondence concerning future relations between the Community and the Department of the Interior in the construction of Orme Dam and related recreational development. You expressed the desire that my intentions with respect to these matters be formally stated for the guidance of Departmental personnel who will be called upon in the future to make decisions of critical importance to the Salt River Community. You mentioned six specific issues upon which you wished me to comment.

Before doing so, I should like to summarize the events leading up to your request.

During the negotiations concerning the development of Colorado River Basin Project legislation, leaders of both the Salt River and Fort McDowell Indian communities expressed deep concern about the effects of Orme Dam on their reservations. Not only would both communities be called upon to surrender land—in the case of Fort McDowell, a very substantial portion of the reservation—but other values, including running streams which are a rarity in the Arizona desert, would be lost to them. Furthermore, there was the likelihood that because of the fluctuation of the Orme Reservoir, many hundreds of acres of land on the Fort McDowell Reservation would be subject to at least occasional flooding and, therefore, limited as to economic use.

Because of all the disadvantages to the Indians in the construction of Orme Dam and Reservoir, the two Indian communities might well have mounted a major national campaign of opposition—such as took place in connection with the Kinzua Dam Project on the Allegheny River in New York and Pennsylvania. However, realizing that the building of Orme Dam would benefit many people in southern and central Arizona, you chose to cooperate with the planners, and I made you a personal pledge that I would do everything in my power to aid you in gaining the greatest possible advantage from a project which, on its face, could have had a significant impact on both communities.

I have to the best of my ability honored that pledge: first, through working closely with the committees of Congress to secure changes in the legislation which were favorable to the Indians; and, second, through issuing directives to personnel of the Interior Department calling upon them to do everything possible—consistent with the Colorado River Basin Project Act—to see that the construction of Orme Dam and Reservoir contributes positively to the economic future of the two reservations.

I turn now to the specific issues which you have raised. The statement of each of these issues is followed by my comments thereon. In those instances where the issue concerns Fort McDowell as well as Salt River, I have addressed my comments to both communities:

1. Orme Dam should be constructed by the Granite Reef location if such construction is physically feasible from the engineering viewpoint.

Comment: From the beginning of discussions with representatives of Salt River and Fort McDowell, I have indicated my strong preference for selection of the Granite Reef site. While a dam at this location might well require the acquisition of more land on the Salt River Reservation than would an alternate location, the potential for economic benefits would overcome this loss.

Construction of a dam at the location of the confluence of the Salt and Verde rivers, rather than at Granite Reef, might actually inhibit economic development of the Salt River Community by removing the reservoir from the area of scenic Red Mountain and eliminating at least three miles of valuable flowing stream from community use. Choice of the Granite Reef site would assure the incorporation of this flowing stream into a deep water lake with obvious recreation potential.

From the standpoint of the Fort McDowell Community, selection of the Granite Reef site would likely require fewer acres of Indian land, thereby reducing the size of the conservation pool on the reservation. Further, it would assure the Indians access to the permanent pool of the reservoir through the selection of land for addition to the reservation as is provided for in section 302(c) of the authorizing act.

Preliminary studies by the Bureau of Reclamation indicate there may be some engineering problems at Granite Reef related to the geology of the area; however, additional feasibility investigations will be undertaken. *Because of the very positive economic, recreational and conservation factors inherent in placing the dam at Granite Reef, we favor its location there unless the engineering and economic factors are compellingly negative.*

2. The Secretary should acquire only easements and rights-of-way on (and not title to) lands within the Salt River Reservation necessary for the construction, operation and maintenance of Orme Dam and Reservoir. Such easements and rights-of-way should make clear that the Community retains the right to use the land for all purposes not inconsistent with the project.

Comment: On February 1, 1968, I testified in the House that I favored the idea of taking easements rather than fee title in the case of Indian land needed for the flood control aspects of the Orme Dam Project. My comments to this effect can be found on page 833 of Part II of the Hearings before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs of the House of Representatives, 90th Congress, 2d Session.

It will be my recommendation to my successor and to the Bureau of Reclamation that every effort be made to keep a maximum amount of Indian land in Indian ownership through taking easements and rights-of-way. The Colorado River Basin Project Act permits flexibility in this regard, and such an approach should make easier the task of evaluating the Indian interest.

As you are aware, section 302(a) of the above Act establishes a right of reverter in the tribes at their option in the event of cessation of use by the Government. Section 302(b) provides for the use or lease of the land by the tribes for purposes not inconsistent with project needs, under terms or conditions fixed by the Secretary. Thus, regardless of how the property interest taken by the United States may be demonstrated, those rights will not have the status of full fee title as that term is ordinarily understood.

It will be the purpose of the Department to facilitate fullest possible availability of these lands for use by the tribes consistent with project needs.

3. Representatives of the Department should consult in advance with tribal representatives in planning and designing the Granite Reef aqueduct so as to: (a) interfere as little as possible with other uses of the land, both present and proposed; (b) route this facility through areas of low present and potential land values; (c) coordinate location of the aqueduct with tribal land plans and programs; (d) insure that the facility will not be unsightly or detract unreasonably from the natural beauty of the area; and (e) design the aqueduct to provide flood control features.

Comment: I consider these requests to be both reasonable and appropriate. In accordance with the policy of the Bureau of Reclamation, consultations will be held with representatives of the Indian Communities during the advance planning and design period of the Granite Reef aqueduct. Every reasonable consideration will be given to the coordination of our plans with those of the tribes. In selecting the aqueduct site it has to be recognized that a number of physical constraints will have to be taken into account and some compromises may be necessary.

It is our understanding that the Salt River Tribe, in cooperation with the City of Scottsdale, has completed a flood control study for the northwest portion of the reservation, and the establishment of a joint flood control district is contemplated. It is further our understanding that you wish to consider the possible use of the Orme aqueduct easement, or an area contiguous to it, for flood control dike purposes and wish to be consulted throughout the planning and construction phases of the project. Officials of the Bureau of Reclamation assure me that such consultation will take place.

4. The Secretary shall exercise his statutory authority to regulate use of the reservoir to promote, and shall encourage other Federal and State agencies affected by the project to accept, the objective of quality recreation and other water-based developments within the Salt River Reservation and, in particular, shall seek to prevent uses of the reservoir area which are incompatible with facilities sponsored by the tribe. To this end, the Community will be invited to participate in all Departmental and inter-Departmental planning for recreation development in conjunction with Orme Dam.

One of the objectives with respect to the Orme Dam and Reservoir, wherever the dam may be constructed, will be to develop the recreation potential of the area consistent with other functions of the system. We recognize that it is vital that the Salt River and Fort McDowell communities be involved from the very beginning in Departmental and inter-Departmental planning for recreation and for other sorts of public developments within the reservoir area since these will surely affect the development of nonpublic uses (including urban developments) to which Indian lands in the vicinity of the reservoir may be placed.

In addition to this consideration, it is important that the Department and the two Indian communities work together to assure that the water-based recreation activities originating from the Indian side of the reservoir are compatible with the public uses originating with that arm of the reservoir extending into the Tonto National Forest.

In this regard, as you know, section 302(d) of the Colorado River Basin Project Act provides that recreation development of the entire reservoir and federally owned lands under the jurisdiction of the Secretary adjacent thereto shall be in accordance with a master recreation plan approved by the Secretary of the Interior. Accordingly, plans for recreation development sponsored by the Indian Community would have to be harmonious with the master recreation plan. At the same time we recognize that it is incumbent upon this Department, in consultation with the Salt River and Fort McDowell communities, to fashion a master recreation plan which gives recognition to the previously mentioned objective of quality recreation development within the Salt River and Fort McDowell Reservations.

5. The Secretary shall instruct the Bureau of Reclamation and the Bureau of Indian Affairs to cooperate with the Salt River Community in realizing maximum benefit from the recreation potential of the Orme Dam project by providing such access roads as are required.

The building of access roads for construction and for optimum public use will be part of the project works. The Bureau of Reclamation and the Bureau of Indian Affairs will cooperate with the two Indian communities in this regard with a view to obtaining maximum benefit from the recreation potential of Orme Dam.

6. Action will be promptly initiated within the Department to secure restoration to the Community of lands within the Salt River Reservation which are the subject of a reclamation withdrawal and which are surplus to the actual needs of the Bureau of Reclamation.

It is our understanding that the lands to which you refer are as follows:

(*a*) The Evergreen Reserve, located in S 23, T 2 N, R 5 E, containing 11.85 acres.

(*b*) The Granite Reef Reserve, which is lot 2 and lot 3 of S 13, T 2 N, R 6 E, containing 41.48 acres.

Pending settlement of the question of the location of the Dam and related facilities, it is not possible to say whether any of the Granite Reef Reserve will become surplus to the needs of the Bureau of Reclamation. However, should plans for the use of this area be modified in the future so as to make possible the lifting of any of the present withdrawal, steps will be taken to effect a revocation and subsequent restoration of the lands to the Salt River Reservation.

With respect to the Evergreen Reserve, a different situation pertains. It does not appear at present that this withdrawal will be significantly affected by plans for the construction of the Central Arizona Project. Recently, as you know, representatives of the Bureau of Reclamation and the Salt River Project visited this area in the company of tribal officials and a representative of my office. Following that visit, the Commissioner of Reclamation informed me that he felt the withdrawal might be lifted from the tract of approximately five acres on the west side of the Reserve. In the interval since receiving this recommendation, I have asked the Commissioner to initiate the steps necessary to effect this revocation. Both the Commissioner of Indian Affairs and the Director of the Bureau of Land Management have been informed of this development.

In closing, let me say that I feel there is a substantial area for agreement between the Department and the Salt River and Fort McDowell communities. I hope this letter will provide the assurances sought by both tribes.

Sincerely,

STEWART L. UDALL,
Secretary of the Interior.

Senator KENNEDY. Our next witness is Mr. Vincent Smith from the Fort McDonald Reservation. We will put your prepared statement in the record in its entirety, Mr. Smith, and it will be read. Maybe you can just summarize it very briefly for us now.

STATEMENT OF VINCENT SMITH, FORT McDOWELL RESERVATION

Mr. VINCENT SMITH. Thank you, Senator. Congressman Udall, Governor Lewis, ladies and gentlemen: Our community, the Fort McDowell-Mohave-Apache Indian community is rather different and unique than those that have made their presentations here this morning. We have resources in our community that need to be developed. But the problem that is facing us in our community is the central Arizona project. We're not only gaining or benefiting from the central Arizona project, but we're losing almost half of our reservation through the central Arizona project. We have 25,000 acres of land and of that, 12,000 would be taken for construction of the Orme Dam.

Although we will benefit, like I've said, there are other uncertainties that hang over us. Our people in the community are presently against the loss of their lands.

They are not against the project, but they are going to lose a great part of their land. And what they're getting in exchange is not comparable to what lands we're going to lose through the Central Arizona Project Act. We'll be receiving 2,500 acres, but the loss would be 12,000 acres. We feel this is not comparable to what we're going to lose.

And the loss of that land would be good irrigable land, which we could develop. So, therefore, Senator, we would like to bring this to your attention. We would like to see some administrative procedures exercised to resolve this. We hope you will be able to do this through Congress and through your colleagues. Thank you, Senator.

Senator KENNEDY. I would like to ask you a question. As I understand, you tried to get some Government land in the Tonto Forest under Forest Service jurisdiction, as alternate land during the negotiations. Is that right?

Mr. VINCENT SMITH. Yes, there is Federal land all around our reservation.

Senator KENNEDY. Secretary Udall supported you, but the Agriculture Department would not open up the land for Indian selection. Is that right?

Mr. VINCENT SMITH. That's right. It was more or less exchanged with developers and the developers are in there now.

Senator KENNEDY. Then they would not let it go to the Indians even with the very strong and positive arguments that were made by Secretary Udall, as well as the tribes. Sometime later, however, these lands were traded by the Forest Service to Page Livestock, were they not?

Mr. VINCENT SMITH. Yes.

Senator KENNEDY. This was to be developed in exchange for mountaintop land in California to go to the National Forest Service?

Mr. VINCENT SMITH. Yes.

Senator KENNEDY. Do you find that distressing?

Mr. VINCENT SMITH. Yes.

Senator KENNEDY. To say the least?

Mr. VINCENT SMITH. We were not even given an opportunity——

Senator KENNEDY. It is outrageous.

Mr. VINCENT SMITH. We were not given an opportunity to discuss this, or negotiate with the interested parties. Therefore, it was just given to the land developer and now that he's pretty well established, there are limited Federal lands around the reservation which we would be able to get.

Senator KENNEDY. Why do you think that a livestock firm was able to get the land while the Indian tribes were not?

Mr. VINCENT SMITH. Well, apparently, it had more money than the Indian people did.

Senator KENNEDY. Do you think it is as simple as that?

Mr. VINCENT SMITH. I would say so, yes. We haven't been able to get any money to develop our reservation. This is what we'd like to do.

(Articles concerning the land transaction referred to follow:)

[From the Phoenix Gazette, Aug. 4, 1966]

CASSADY RENEWS ATTACK ON SWAP INVOLVING LAND NEAR SCOTTSDALE

Brig. Gen. George Cassady (ret.) has renewed his attack on an exchange of public land in Arizona for private property in California.

In an interview on a Phoenix radio station he spent almost an hour outlining the trade in which the government granted title to the land east of Scottsdale for $150 an acre.

Cassady, retired Air Force general, is business manager for the Salt River Pima-Maricopa Community.

He said the land, 6,839 acres lying between Scottsdale and the McDowell Mountains, was sold in a three way deal involving a California doctor Trans America Title Insurance Co., and Page Land and Cattle Company.

Cassady, speaking on a station KXIV program last night, said the property had been appraised at $150 an acre and that adjacent land of comparable value had been assessed at $500 an acre and later sold for up to $700 to $800 an acre.

Emmett V. Graham, a Scottsdale realtor, called in during the program and said other land adjacent to the parcel sold to Trans America and Page has been subdivided and is now being sold for from $3,500 to $6,500 per lot.

Cassady said the land, located in what is considered some of the world's most scenic desert, was deeded to the two companies, Trans America and Page, in exchange for some privately-owned land in California, situated in the Point Reyes National Seashore Park.

The Arizona land is split by the proposed Shea Boulevard extension to the Beeline Highway and is 3½ miles from the east boundary of Scottsdale.

Cassady said he became interested in the transaction because as business manager for the Salt River Tribe he wanted to keep apprised of land values adjacent to the reservation.

Cassady added that he has not been permitted to look at the files of the Point Reyes transaction since he had photostatic copies made of various records on the deal.

The Indians also have asked the Public Land Law Review Commission to seek a delay in a proposed land swap between Page and the National Forest Service.

In the proposed trade, the Forest Service would exchange 6,773 acres of Tonto Forest land, east of Ft. McDowell and straddling the Phoenix-Payson highway, for 8,683 acres within the Sitgreaves National Forest on the Mogollon Rim north of Kohl's Ranch.

The Tonto land is near the site of proposed Orme Dam, part of the Central Arizona Project.

[From the Phoenix Gazette, Aug. 11, 1966]

LAND VALUE AT ISSUE

Refusal of two governmental agencies to produce appraisals of public land in Paradise Valley which was traded for privately-owned land in Point Reyes, Calif., today was termed in violation of President Johnson's July 4 "Freedom of Information" bill.

Brig. Gen. George S. Cassady, USAF Ret., made the charge today in a letter to George B. Hartzog, director of the National Parks Service in Washington. General Cassady is business manager of the Salt River Pima-Maricopa Indian Community.

The general also said three U.S. agencies were in violation of a special Act of Congress which requires that property to be exchanged must be appraised at "fair market value."

Cassady said 6,839 acres of land 3½ miles northeast of Scottsdale, which straddles the new extension of Shea Boulevard to the Beeline Highway, was appraised at $150 per acre in the transaction involving the Point Reyes property. He asserted that comparable land adjacent to the Paradise Valley parcel had been appraised at $500 per acre and later sold for as much as $800 per acre.

The 6,839 acres in Paradise Valley was deeded to Page Land and Cattle Company and Trans America Title Insurance Company for land the two companies acquired from a California doctor at Point Reyes, Calif.

A national monument has been established on the Point Reyes land, and the exchange of properties was permitted in a special Act of Congress of Sept. 13, 1962.

Page now has another request before the Interior Department for a trade of 6,773 acres of Tonto National Forest land which straddles the Beeline highway for 8,683 acres the company owns on the Mogollon Rim north of Kohl's Ranch.

The property is just east of Fort McDowell, near the site of the proposed Orme Dam, which is part of the Central Arizona Project.

General Cassady and the Arizona Inter-Tribal Indian Council oppose this exchange on the ground that the Apaches at Fort McDowell and the Pima Maricopas would be forced to move if the dam is constructed because their lands will be flooded.

The two tribes would not want to move farther than necessary from their present homes, the council has stated.

General Cassady became interested in the Point Reyes deal when, as business manager for the Pima-Maricopa, he sought out records of the transaction so that he would be more knowledgeable about the value of the tribe's lands.

The general has charged that the appraisal of the Paradise Valley land was too low and produced a copy of a letter from the Bureau of Land Management here which indicated that an "estimate" had been made of the value of the Paradise Valley property to the Page Company before the appraisal was made.

Cassady claims the "estimate" of $1 million for the 6,839 acres was a guide line for one appraisal which came out exactly $1 million.

In today's letter, Cassady quoted President Johnson's statement on signing the "Freedom of Information" bill:

"I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."

Cassady said to Hartzog, "It is my sincere and earnest belief that both the spirit and intent of this bill are being violated by the National Parks Service in refusing to allow me or any other interested citizen to look at the pertinent files on the Point Reyes National Seashore land exchange with Page Company . . .

"I will be grateful if you could review by request for permission to look at the files, particularly the appraisals and associated correspondence on the Page exchange in light of the President's statement."

Cassady said files on the transaction were closed after he saw them once and had records photostated. The deal has been closed for more than one and one-half years, he said.

Senator KENNEDY. Will you have any access to the shore areas for development?

Mr. VINCENT SMITH. There are certain provisions written in the bill, but we feel it's limited at this time. Hopefully, like I mentioned, through administrative procedures this can be resolved or changed to be able for us to have control.

Senator KENNEDY. Do you think if they are going to take all this land of yours and flood it, that at least they would give you access to the shore? Does that sound unreasonable after they have taken 10,000 acres?

Mr. VINCENT SMITH. We feel it's very unreasonable that they're taking a lot of our land and not letting us build any permanent structures within that area. As you read our report you will note that because of the fluctuation of the reservoir level, the shoreline is not suitable for recreational purposes also.

Senator KENNEDY. OK. Thank you very much.

Mr. VINCENT SMITH. Thank you, Senator.

(The complete statement of the Fort McDowell Mohave-Apache Indian community follows:)

STATEMENT OF FORT MCDOWELL MOHAVE-APACHE INDIAN COMMUNITY

Mr. Chairman and members of the committee, it is a known fact that the 90th Congress of the United States voted approval of Public Law No. 537 Authorizing the Central Arizona Project with the Orme Dam being one link of the CAP. This project if developed as authorized, would inundate and use approximately 60% of the total 24,680 acres for water storage and flood control. The area to be utilized for the project is the best area on the reservation.

To argue that the tribe might be better off when the dam is built is uncertain, but the tribe must weigh what it now has against the uncertainties and promises of the future. The general attitude of the community is against the loss of their land for the Orme Dam project.

The grant of 2500 acres for land lost in the easement as provided in the bill is only a token as compared to the 12,823 acres in the affected area. The tribe therefore feels strongly that an amount equal to or greater than the amount in the affected area should be provided the tribe. The quality of land taken should be considered in settling this issue. The remaining acreage of 11,857 in the unaffected area consists of terrain with the greatest slope. There are sections of land owned by the U.S. Government and the State of Arizona which would be desirable for this expansion. Acquiring this additional land would help off-set the potential economic loss from natural resources.

The tribe has experienced some difficulty in planning and securing funds for development because of the status of Central Arizona Project. Two futures must be considered. One under existing conditions and a second under the threat of the loss of land and the need for relocation of the community.

The problem of relocating a community involves far more than the movement of people and houses from one place on the land to another. People and houses are not a community in themselves. A community is a group of people, the land on which they live, the activity spaces in which they organize their daily lives, the networks by which they communicate with each other, and with the outside world, and the institutions through which they relate to one another and which guide their conduct in all forms of social behavior. We feel provisions stated in the Bill are not adequate for the community to relocate without fracturing the community structure.

The bill implies that the tribe may use land within the flood and conservation pools for grazing, recreational activities, etc., but restricts any permanent construction in the flood zone. We would like to indicate the importance of the use of these lands when possible and further to explore the possibilities of allowing some permanent structures in the flood zone if no additional land can be acquired for the tribe. It appears that the land designated for the flood zone is in excess of the amount required under these conditions.

Some assurance should be given in regards to controlling the water level in the permanent pool in order to reduce the amount and frequency of mud flats. Because history lends little credibility to promises for the Indian, we wish to state that the tribe must have a guarantee to the use and right of lake shore lines including the operation of concessions as a future income potential and also a guarantee of water rights which are to be allocated in the future from CAP for urban development of the reservation lands and to maintain water rights under Kent Decree or other sources with the right to apply water to any portion of the reservation. It should be understood that the free-flowing Verde River is the key

to the value of the land as well as a great economic potential. The tribe derives income from the river presently through outdoor recreation. A study made for the community by Western Management Consultants, Inc., indicates that the economic loss that would be suffered by Fort McDowell based on a 6% discount of income over a one hundred year period after construction of Orme Dam is estimated at $19,766,000. The same study shows that in view of long run urban development potential of its land, the tribe stands to lose approximately $470,000,000 over the one hundred year period from ground lease income.

The tribe feels they should further have the following privileges:

1. Retain over-all planning control of public and private land developments on their land.

2. Have a voice in the public recreational use of impounded reservoir waters so as to control the "public nuisance" factor.

3. Have the right to either construct (or settle for the construction of) access roads and bridges north from the proposed new alignment of Beeline Highway, of adequate right-of-way to serve ultimate development, and at an elevation equal to Beeline Highway at its crossing of the Verde River. These access roads to run parallel to both east and west boundaries.

4. Have the right to construct, or settle for, the construction of a dam across the flood plain, located in the upper one-third of the reservation, at an elevation high enough to serve as a connecting road between eastern and western sections of the reservation that would be separated by the Orme Dam flood plain under maximum flood conditions. Included would be the right to construct, or settle for, the construction of an access road crossing the proposed reservoir at an elevation equal to Beeline Highway.

All requests made are in addition to all provisions provided in the Bill. We feel that these requests are reasonable and just in comparison to the great loss which the community must bear.

It is our hope that these issues can be resolved through administrative procedures in order to expedite time.

Respectfully submitted.

CLINTON PATTEA,
Tribal Council Member.
For HARRY JONES,
Tribal Chairman.

Senator KENNEDY. I want to thank Congressman Udall for being with us this morning. He must leave now for another appointment. He is an old friend and someone I have a great respect for, and who I notice, is a great friend of the Indians.

The next witness is Mr. Lopez of the Papago Tribe.

STATEMENT OF AUGUSTINE LOPEZ, PAPAGO TRIBE

Mr. LOPEZ. I don't think Moe's leaving just because he's got an appointment. I think he knows I'm coming up.

Senator KENNEDY. I can hardly wait to hear what you have to say. Maybe I had better leave.

Mr. LOPEZ. It's been my pleasure this morning to be able to have you on the ballground for a change. Ladies and gentlemen, I have a statement I'd like to make to you very briefly and try to let the other guys have a chance.

The Papago people live in a semidesert area of southern Arizona, comprising nearly 3 million acres. We have no surface water except for occasional floods in years past. Our people have used floodwaters for irrigation, but this has always been a losing gamble because of the uncertain water supply.

Beginning in 1915, the Bureau of Indian Affairs drilled a few wells in the northern part of the reservation at Chui Chui to secure water for irrigation. The wells were successful at first, and a project of 600 acres was developed by the Papagos in May 1949. The Secretary of the

Interior approved a plan to develop 11,000 acres in the Chui Chui area for irrigation. Funds were supplied to drill nine additional wells and construct an irrigation system for 1,700 acres. This land was immediately put to use by the Papagos.

However, pumping of ground water by non-Indians adjacent to the Indian wells has lowered the ground water table nearly 200 feet since 1915, and the well production now is only a fraction of what it was.

Senator KENNEDY. How long does it take for that water table to come back and be restored?

Mr. LOPEZ. It will take quite a few years.

Senator KENNEDY. If you were able to halt the continued downward trend, would it take several years, or several decades?

Mr. LOPEZ. Several years. So instead of 700 acres, the Papago now farms about 400 acres. Since the San Carlos water can come from wells only for a limited time, a supply of water from the central Arizona project will be vitally necessary within a few years.

The city of Tucson is now pumping water beneath Indian land. The Papago Tribe wants to complete the 11,000-acre-feet project approved in 1949, with use of the CAP water and to enlarge the project to 51,700 acres. An expression of interest was submitted to the Arizona Water Commission for approximately 400,000 acre-feet of water for approximately 75,000 acres of land for domestic, industrial, livestock, and recreational uses.

The reservation contains more than a million acres of land suited to farming if water supplies were available. The Papago needs the Central Arizona project, and a share of the water decree in the State of Arizona.

I have been at a few meetings recently where Mr. William Veeder spoke on behalf of the Indian water rights. In general we believe that Mr. Veeder is trying to help the Indian tribes. We disagree with his position of opposing the Central Arizona project. He certainly doesn't speak for us about that. We on the Papago reservation are helping ourselves in an effort to develop our natural resources.

Presently there are three copper mines going into production on the Papago Reservation. ASARCO at San Xavier, and Hecula and Newmont mines just southwest of here. Royalties from these mines will provide funds to further our education, housing, and employment, perhaps. Papago Indians are now given the opportunity to work in these mines. Water is a vital commodity if these resources are to be developed. Senator, you may be interested in knowing that the Papago Tribe, without any assistance or Federal money has formed its own utility company known as the Papago Tribal Utility Authority.

We are purchasing power wholesale and are selling it to the mines. From this income we will be able to extend our electricity to the rest of the people on the reservation. Also, the utility authority hopes in the future to serve Indian villages that do not have water, sewers, or electricity.

In closing, I may emphasize the need for your support, Senator Kennedy, not only with the Central Arizona project, but with other Indian programs on our reservation. I'd like to add something to the statement that I just made. Much has been said by the tribes of Central Arizona that we need the Central Arizona project, and we're

asking you to put yourself in a position to help guarantee us some water from that central Arizona project.

I might mention that the five tribes of the Central Arizona project have passed resolution uniting us. Right now they're ready to hire an economist to look into the water situation in the State, and see if we might be able to come up with some figures in the very near future.

Senator KENNEDY. Let me ask you: Would you support the Central Arizona project if you were not going to get any water?

Mr. LOPEZ. Yes, sir.

Senator KENNEDY. You still would?

Mr. LOPEZ. Yes, sir.

Senator KENNEDY. Even if it meant a threat to the rights of the Colorado River tribes and the Navajos?

Mr. LOPEZ. No; I wouldn't take anybody's rights away.

Senator KENNEDY. Again, even if you were not going to get any water, you would still support the program?

Mr. LOPEZ. Yes.

Senator KENNEDY. All right, thank you. Did you have anything else?

Mr. SPRAWLS. Senator Kennedy, as you know the Papagos have their problems like everybody else. We are always trying to solve them. One of our biggest problems right now is the Central Arizona project. What it really is has been stated by others.

STATEMENT OF JAY MARAGO, JR.

Mr. MARAGO, Jr. They don't really have a guarantee of what we're going to get, but we're trying to find out the facts and figures. We feel that whoever comes here to have anything to do with the Central Arizona project, should work with all the tribes. When I first heard about Mr. Bill Veeder, I talked to both sides, but I feel that since he came down here——

Senator KENNEDY. On what points do you disagree of Mr. Veeder? As I understand Mr. Veeder, he feels that there have been no specific guarantees to the Indian tribes that are enforceable; that it is only the apparent good will of the present Secretary of the Interior.

Moreover, that the project does threaten, or at least there is a potential threat to Indian rights. Until these rights are assured, and until these tribes get warranties, that the program should not go forward. Now, maybe you could tell us what concerns you about that position, or about other positions he has assumed.

Mr. MARAGO, Jr. I feel that if he's a water expert, which I'm sure he is, I feel that if he wants to solve these problems, that he should contact everybody concerned. But I feel he came down here and took sides, and it seems like he's just trying to pit one against the other.

A VOICE. And also I was very discouraged by Mr. Veeder. If he really does care for Indians and their water rights, then he should treat them with respect at all times. At the National Congress of American Indians convention in Reno Mr. Tribal Chairman, Mr. Augustine Lopez, stood up to address a question to Mr. Veeder on the central Arizona project. He started calling him a friend in a direct derogatory manner. I felt that here's a very basic thing. If he can't treat people and your leaders with respect, how can there be so much difference between that and what he says is his interest in their water rights?

Senator KENNEDY. Let me make a comment. This whole area is one of enormous complexity, and people have given a lifetime to attempting to understand it. I never thought that Mr. Veeder ever represented any profit interests. I never had the impression that Mr. Veeder has taken the position of the developers or non-Indian reclamation users.

I mean, it is difficult for me to see how, looking back over the history of Mr. Veeder, any private group, or non-Indians have benefited from any of positions that he has assumed. And, as a matter of fact sometimes your friends by your enemies. The ones that are trying to get rid of Mr. Veeder are these special interest groups from what I have seen.

Obviously, we are not here for a hearing about Mr. Veeder. I respect your view. It is interesting, but I want to say something quite frankly: I have given this some study, but not nearly as much as I would have liked to. As chairman on the Senate Subcommittee on Indian Education in Washington, D.C., and in traveling around the country, I have listened to many Indians tell about the Federal Government's broken promises to them.

This is what you hear time and time again. Now I hear a spokesman for Indian tribes who is willing to commit the future of their tribes on another promise that does not even have the sanctity of a decree. Time and time again rights have been violated, or not even given the validity of a court decision, or ignored in statutes of law, or failed to be implemented if they were. I believe the track record of the Federal Government has not been good.

I think that is a gross understatement of the mistreatment of the American Indian. What I am down here for, is to try and listen to the comments that have been made this morning about the assurances. That the leaders are willing to give, not to me, a Senator from Massachusetts, but to their tribal people, the assurance that things are going to be rosy when the Central Arizona project is going to be completed, is surprising to say the least.

Now, I pray and hope you are right, and I will work in every way possible to insure that result. But, it does startle me somewhat that statements can be made with such assurance, given the history of the relationship of the Federal Government with Indians. That is the only point I want to make.

Mr. LOPEZ. Did you say you are going to assure us the water?

Senator KENNEDY. I cannot do that. I wish I could, I wish I could. I am not so sure that anybody else can after any fair reading of debates and studies on the subject. You obviously know a good deal more about this than I do, but I don't know of anyone who would be willing to go right to the line and write such a guarantee out on a piece of paper. If there is, why don't they do it? If they can, why don't they do it. I just don't know.

Mr. LOPEZ. Senator Kennedy, I hope that you will be able to help us out in any way you can as far as central Arizona project is concerned. As we said before, we got a good start, we're going to keep moving, we're not going to stop.

Senator KENNEDY. That is great. Thank you very much.

Is Mr. Mike Ashley from White Mountain Apache here? [No answer.] Mr. Marvin Mull from San Carlos is here and it is nice to see you again.

STATEMENT OF MARVIN MULL, FLOYD MULL, AND EDMUND WESLEY, SAN CARLOS RESERVATION

Mr. MARVIN MULL. Mr. Kennedy, we are representing the San Carlos Apache Tribe, and I would like to say that we're also the supplier of water to the Gila Maricopa Indian Reservation here. Because of the location of the San Carlos Lake, and after hearing some of the tribal leaders statements, I think that we'll benefit by supporting the Central Arizona water project also. The reason I say this is because we have more than half-a-million dollars development at the San Carlos Lake.

This past summer the lake went way down and it left many fish dead. We have been trying, unsuccessfully, to keep the water at a certain level all year round. I think that in order to keep the water at a certain level all year around, the way to do it is to support the Central Arizona project also.

I have other things that I would like to present to you, Mr. Kennedy, but since the time is very limited, I'll hand you a statement which I have in writing.

Senator KENNEDY. Fine. It will be included in the record.

(The prepared statement of Mr. Marvin Mull follows:)

STATEMENT OF MARVIN MULL, CHAIRMAN, SAN CARLOS APACHE COUNCIL

My name is Marvin Mull, Chairman of the San Carlos Apache Tribe, located at San Carlos, Arizona.

The San Carlos Apache Tribe is concerned about its water rights.

The Salt River originates on our Reservation. The Gila River also flows through the San Carlos Reservation. Coolidge Dam releases most of the water below to the Central Arizona Project area, including the Pimas. San Carlos River also originates on our Reservation.

When the original Indian Water Rights Claims were made, the Apaches were included. We are not by nature farmers, but we can make use of the water in many ways. The San Carlos Irrigation Project receives its power from Coolidge Dam. We have some potential farm land which will need irrigation water.

The phreatophyte program was approved by the San Carlos Apache. The trees were removed but the BIA, as usual, has been slow to reseed these areas.

We need water for our cattle and need more ponds on our range land. We should have sprinkler systems where our range grass is sparse.

This past summer, thousands of fish died because the water level of San Carlos Lake was too low. During this time water kept flowing down the valley.

We would like to preserve some of the water for our younger generation as well as for anyone else.

I know that this hearing is about Indian water rights; however, I would like to tell you about some of our problems at San Carlos.

For the past few years, some of the tribal enterprises, such as the tribal store, have created serious financial problems for the San Carlos Apache Tribal Council. During these years, the BIA had basic control of the enterprises. Recently, the tribal council decided to take these matters into its own hands and begin to do things for itself. We hired a new business manager and replaced our accountants. A financial program has been developed, and we have asked the Area Office of BIA to permit us to withdraw funds from the U.S. Treasury to pay off our creditors and start again.

Senator, I would like to give you an example of how we are trying to help ourselves. Just 5 months ago, the tribal council created the San Carlos Apache Tribal Mining Board for the purpose of developing our natural resources. Although we had to spend money to hire a private mining consultant and a mineral lawyer, the program has already begun to pay off. We have encouraged one of the large mining companies to do mineral prospecting on our mineral strip; and before this year is over, we hope to have enough funds to hire some geologists to assist us further.

It is only from the proper development of our land that we will be able to better ourselves; we are trying to work closely with BIA; however, if we are unable to get these new projects approved, we may ask for your assistance in Washington.

We, as the other tribes here, are concerned about our water; and as you know, in times past the BIA and Interior Department have not helped us but have done the opposite. The proposal for an Indian trust counsel to protect the Indian' legal interests is needed.

This Committee can be of assistance to us by coming to our aid when we need you, as we do today.

Mr. MARVIN MULL. Mr. Floyd Mull, who is a member of the council and also chairman of natural resources for his tribal council, would like to also make a presentation. So, Floyd, will you?

Mr. FLOYD MULL. Senator Kennedy, it is a pleasure to be here. You know, all this time I heard about what you and the President have done for my people. Therefore, I would like to make this statement. I am resource chairman on my reservation. We are planning developments for recreation purposes on what we call the mineral strip. We need that development. The old boundary line of that mineral strip needs to be resurveyed and we have talked about this with the Bureau of Indian Affairs. The last time that I heard from them, they wrote a letter to Washington. But as we all know, it takes money to do these things. That's what we always have been told. But we hope with your help that we get this money for surveying our boundary line.

I am also a member of the cattle association board of directors on this reservation. We also need repairs on these old boundary lines on the San Carlos Indian Reservation. As I have said in the past, it takes money but we don't have that kind of money. As we know, we Indians need a lot of help with money. Moneys have been set out of the United States to aid foreign countries.

Here we are in our own background. We need this money and lots of help. And we Indians hope that you will help us with some of these needs on our reservations. We need a lot of recreation developments also.

And as we all know, we have to have a road built to where we can develop things. I'm also known as an Indian contractor. Four years ago, under the Buy Indian Act, they appointed me to start on this Indian road construction contract.

I started, and I guess I've been watched and helped by the Bureau of Indian Affairs through their engineers. I've been successful on this job, and now they are closing the door on me. I think somebody, the white contractors, have been trying to close the doors on our jobs, because I guess they don't want to see the Indians get ahead. But I think this was the greatest opportunity that I ever have in my life. I'm not the only one here. There are some other Indians involved in this contract.

In the past 4 years I have worked for little over $2 million on this job, and 100 percent of the employees were Indians. I really give great thanks to what the Bureau have done for us on this. And I think what I have heard through the Bureau, is that they are going to do away with this Buy Indian Act, and what they came up with originally is——

Senator KENNEDY. Excuse me, what kind of jobs are these men doing?

Mr. FLOYD MULL. Well, mostly we are doing the road construction and these Indians are the operators of the heavy equipment.

Senator KENNEDY. They operate heavy equipment? We have been hearing about how impossible it is to find Indians that have training and skills. You have been able to find individuals and train them yourself, I suppose, and make them highly skilled individuals who are able to work effectively and competitively.

Mr. FLOYD MULL. Yes.

Senator KENNEDY. With any other people, is that right? We were up in Four Corners yesterday and talking about Indian employment. "Well," they say, "all we are looking for is a qualified Indian." What they haven't found out is that they can find them if they are interested in finding them. That is what you have done.

Mr. FLOYD MULL. Yes.

Mr. MARAGO, JR. Senator Kennedy?

Senator KENNEDY. A minute or two because we are running out of time.

Mr. MARAGO, JR. Floyd has been working on the San Carlos Reservation and also at the White Mountain Apache Reservation. He has his own crew and also is working at San Carlos. He hires some boys when he's up on the White Mountain and he takes them up on the San Carlos with him also.

Senator KENNEDY. Very good.

Mr. FLOYD MULL. And as you know, I'm not a well educated man. I never did finish high school, but I have a job in the Bureau of Indian Affairs as the estate man, and I have learned a lot of things from one of the engineers. Therefore, I guess they had confidence that I can handle this job, which is as manager of this big job. But I always had confidence in my men also. I think that they can do the job. We have been critized. They feel that Indians cannot do the job, but I think they can do the job.

They finally came up with what they called a Small Business Administration loan. Now they say that the Indians have to be bonded during the job. With this SBA loan they willing to back me up and bond me. There was a man from the Bureau that said the SBA can do this. Now, I feel like I'm out in the field hoping that some jobs comes my way, and that the SBA would be able to bond me to do this job.

With your help, Senator Kennedy, I hope that we will have more jobs development. I'm not talking just for myself, but for the American Indians.

Senator KENNEDY. Very good statement. Thank you. The next witness is Mr. Edmund Wesley.

Mr. WESLEY. Senator Kennedy, my name is Edmund Wesley and I am the vice chariman of the San Carlos Apache Tribe.

Senator KENNEDY. There are just a couple minutes here, I am afraid. I am sorry.

Mr. WESLEY. I am the member of the Intertribal School Board which consists of four States, California, Nevada, Utah, and Arizona, and we are having a hard time getting the construction funds for different schools.

Senator KENNEDY. Is that under Johnson-O'Malley?

Mr. WESLEY. No. Our plan has been for an educational building and gymnasium. At the area level our funds have been cut by $8,000, and we are talking about quite a few students from four States. I believe an Indian needs an education. Education is needed pretty badly here, and if we don't have these facilities to educate our Indian people, how are we going to take part in what we call a white man's world. And I hope, Mr. Kennedy, that you can try to get some of the funds that are really needed, and get some of the funds for constructing buildings that are really needed for the Indian students. Thank you.

Senator KENNEDY Very good. We had a good Indian education bill that just passed the Senate 2 months ago, but we are going to have to pass it in the House, and also get the funding for it. But I think these last two witnesses have shown the importance of both Indian education and economic development, because you are going to train the young Indian people.

That is terribly important, obviously, to the Indian's own personal self-improvement, the tribe's development as well. Hopefully you are going to train a person who can come back to an opportunity within the Indian community if that is their desire, and devote their skills and talents towards the future development of their tribe.

That is why these two comments are particularly useful. Thank you very much.

A VOICE. Senator, I have a statement here for your information also. We have a lot of problems, you know, besides what these two others have presented here. But I know your time is very limited and there are other tribal leaders waiting to be heard. I only wish that there were more Senators like yourself who can take the time to be with the Indians.

Senator KENNEDY. If you want to keep talking, you keep talking. We will not interrupt you any more.

A VOICE. We, as Indians here in the State of Arizona know who our friends are. And especially, you know, a Senator from the State of Massachusetts that flies all the way to the State of Arizona to meet with the wonderful people here in their own State. Thank you.

(The following memorandum was submitted by Mr. Marvin Mull for the record:)

NOVEMBER 15, 1971.

Memorandum

To: Area Director.
Attention: Real Property Management.
From: Superintendent, San Carlos Agency.
Subject: Filing actions on behalf of Indians.

We have carefully reviewed your Memorandum (and the accompanying correspondence) of September 21, 1971 and forward the following items that may fall within the categories mentioned.

1. *Goodwin Spring:* For the past several years Mr. J. L. Wilson who operates farming land adjacent to the Reservation east boundary transports water from Goodwin Spring (within the Reservation) to his farm land. This is accomplished by a ditch on Tribal land for which he has no easement. All the correspondence related to this has been forwarded to Mr. Lavelle, Field Solicitor.

2. Decisions regarding tracts of presently unsettled ownership within the "Mineral Strip" could possibly result in the Tribe having a legal basis to claim compensation for past income from lands that has not accrued to the Tribe. The Area Office Realty Branch is fully aware of the details concerning this item.

3. A long standing question of interest to the Tribe is the status of several sections of land located at the extreme southwest portion of the Reservation mostly in T4S, R27E.

Reservation maps dating back many years include a portion of land that a resurvey between 1920 and 1935 excluded from the reservation. Research at this Agency has never revealed why the resurvey was made.

We are not aware of any other claims that exist on the San Carlos Reservation. We have also consulted with the Tribal Resource Committee Chairman and they are not aware of any pending claims.

Senator KENNEDY. Thank you very much. Mr. Benashley from White Mountain Apache Reservation is next.

STATEMENT OF FRED BENASHLEY, WHITE MOUNTAIN APACHE

Mr. BENASHLEY. Senator Kennedy and Governor Lewis, ladies and gentlemen: I am representing the White Mountain Apache Tribe. We at the White Mountain Apache Tribe request that an evaluation be made of an agreement between our people and the Salt River Water Users Association. I agree with the Senator that we must be assured that water rights will be guaranteed. Also, we need to discuss funding for our boundary fence. Our tribe over the past 3 years has spent about $100,000 on our boundary. We need help in many ways, but we really need help in protecting our reservation.

This would also help employment problems by using our local Indians to contract for the fence. Senator, I don't want to take much of your time. I know you are a busy man and I'm sure you're here to try to help all the Indians that you can. I wish you best luck. Thank you.

Senator KENNEDY. Thank you very much. Our next witness is Mr. Aaron Russell, Yavapai Apache and Mr. Brander wanted to join you as well. Maybe both of you could come up.

STATEMENT OF VINCENT RANDALL

Mr. RANDALL. Senator Kennedy, my name is Vincent Randall, chairman of the Yavapai Apache Tribes of Campe Verde. And to my right is Mr. Aaron Russell, vice chairman. We'd like to make a couple brief statements. Our reservation is totaling, maybe 650 acres, with about 600 members enrolled on the reservation. The question I believe is, are the Indians well represented in their rights as far as small tribes are concerned? I can definitely say, no. There's no help at all in any way, especially in the area of legal counsel. Many times some problems do arise with us, but without the financial backup or anything, we do not have legal counsel. So the only door we have is the Bureau of Indian Affairs Tribal Operations.

And I would like to say right now that they do not do the job, and I can give you an example. I also would like to back up Mr. Benashley. We also, even as small as we are, find that the Salt River project is also interested in our water rights. We also would like to ask that there would be a complete study on the agreement.

But the Bureau did push it through other reservations. On our reservation some other tribal council members were influenced by the Bureau of Indian Affairs and it was signed and passed. I would like to go on record as saying we'd like to renege on the agreement, and we'd like to bring it back for further study.

Senator KENNEDY. Why would you?

Mr. RANDALL. As far as we're concerned, we're just developing at this point. Back at the time when they presented the agreement

to us, with all the legal terms and so forth, we had no legal counsel sitting there helping us.

Some of the things really puts a pigeonhole on how we could use what water they were going to allocate us. They were going to allocate us some 550 acre-feet of water, but in the agreement it said exactly how we're going to use it.

We couldn't build stock tanks, or if we wanted to expand, we couldn't use that water over in the expansion area.

Senator KENNEDY. You think you would have made a different agreement now?

Mr. RANDALL. Definitely. I was one of the people against it. In fact, it was a split vote in the council against the agreement.

Senator KENNEDY. Who was representing you?

Mr. RANDALL. The Bureau of Indian Affairs, a gentleman by the name of Cal Brice.

Senator KENNEDY. Where is he now?

Mr. RANDALL. Like all good Bureau of Indian Affairs people he's up with the Great White Father in Washington. I would like to briefly explain another incident to you. We were also approached by a woman that homesteaded 60 acres, and had fenced it and lived there for something like 60 or 70 years. She had no money and the subdivision developers were coming in and were giving her a rough time. So they came to the council for help. We could offer no help as far as giving her legal counsel.

We asked them to represent her because she said that in the end she would like to have it under trust and become reservation land. So 60 acres were involved. When the smoke cleared with the help of the Bureau of Indian Affairs lawyer, she got 3 acres.

I believe at this time maybe the Vice Chairman, Aaron Russell, would like to say something.

Mr. RUSSELL. On this subject of land, there is an organization in California which goes under the name of Return Surplus Land to the American Indians.

Senator KENNEDY. How successful have they been, sir?

Mr. RUSSELL. Well, they managed to acquire about 65 acres which they are using for a university at this time. And under this, we understand that the Federal Government is turning the surplus land over to State, county, city and other private agencies. We feel that if any of these lands are turned over to anybody, it should go to the original owners of the land.

As the chairman has stated, our acreage is only 500 acres, and also we've had a land claim. Under this claim, I think the Indian Claims Commission awarded us a judgment in our favor for about 9 million acres. We feel, if there are any surplus acres in that land, it should be turned over to our tribe. Thank you very much.

Senator KENNEDY. Thank you; very good. Mr. Pat McGee is next.

STATEMENT OF PAT McGEE

Mr. MCGEE. I am Pat McGee. Insofar as the Central Arizona project is concerned, we have no definite pro or con because where we're located, it doesn't affect us. The owners of Central Arizona project, I understand will need to bargain with the Salt River Project Association. But I was asked to express here, appreciation that

someone from the level of Congress has come to demonstrate a concern over Indians. We feel that we are all brothers, but it appears to even some of us that we're divided in issue. But basically I don't think that as Indians we are divided. We know that Indians over on the Colorado River are not really greedy for water that would come down to the Pima Indians down here, if the need is for basic needs.

But on the other hand, we would resent it if they weren't using it for raising crops, drinking water, or things like this. I understand that near McDowell there's water being shot up into the air. There's artificial big surf in the community nearby somewhere. Well, if the Colorado River tribes choose things like that as part of their plans, they're entitled to it.

They should have the opportunity first to establish sophisticated plans. Well, time is against us. We do not have this kind of sophistication. Therefore, it becomes very important that more emphasis be put in the area for planning for all Indians, regardless of where they're located on the map.

But we do need to catch up with the non-Indians. They're far ahead of us in that area. This is the concern we have. Thank you.

Senator KENNEDY. All right, we are really short of time. We have some names here. Mr. Terrence Booth and then Mr. Lara and Mr. Lupe.

Mr. LARA. I decline to use your time.

Senator KENNEDY. Thank you very much. As I mentioned, any of you who want to file a statement, because of some things we have been talking about, that have given you some ideas, or jarred your thinking a bit, write it out for us and we will make it a part of the record. Mr. Terrence Booth.

STATEMENT OF TERRENCE BOOTH

Mr. BOOTH. Most Honorable Chairman, Senator Kennedy, most Honorable Governor: I would like to put in the record what I believe the Central Arizona project is. They're asking for 100 percent of diversion of water. This is what I have read. And also I'd like to know how the Indian tribes are going to be assured, when in fact it is written that Central Arizona project would divert 100 percent of the water. And I believe that we are not fully involved. What I hear is looking for assurance, hoping for assurance.

We do have several tribal chairmen here, and I know in Washington they have a Tribal Chairman's Association, and I want to know why they could not have input on the Central Arizona project, and why they are not aggressive, and why they are not speaking out for what is rightfully theirs.

I know there are several agreements and several decrees which state in fact that the Indian does have his rights to the water; I'm one who will not stand back, and I'm one who opposes the central Arizona project. If it comes into existence, I hope to see that we have a direct voice in it, and where we rightfully would have our water. I'm not a member of the tribe from this area, but I'm married into it and I'm concerned for all of my fellow men. And wherever I can, I would speak out for my fellow man. That's all I have, sir.

Senator KENNEDY. Thank you very much. Mr. Lupe.

STATEMENT OF RONNIE LUPE

Mr. LUPE. Senator Kennedy, I guess I more or less represent the total Indian population in the United States by having been elected at the Reno convention as the vice president of the National Congress of American Indians. I represent these Indians, by virtue of being prior chairman of the White Mountain Apache tribe, by being presently employed by the White Mountain Apache tribe as legislative coordinator, spokesman, liaison, and numerous responsibilities which requires public relations, negotiations, and numerous of other activities that my tribe has. I also speak for the national organization, and the State of Arizona as a member of this organization. All tribes represent this organization.

One of our main concerns, Mr. Senator, as Indian people in the United States, is that we have seen our country taken away from us ever since the Mayflower landed on our shores. While hatred, bigotry, and racism ran across our country, we continued culturally and as an allied nation. Outside people attempted to completely do away with Indian identity in our country for over 300 years.

In spite of this we still exist. Our identity is still here, our language is still here, our religion, our way of life still flourishes among the people.

The people that have come over here will respect you, but please, Mr. Senator, when you go back to the White House——

Senator KENNEDY. I hope the Arizona tribes do not have to wait for that.

Mr. LUPE. We have seen many people, spokesmen from the White House, come to our reservation, come through our town, come through our community. There have been many phrases, many statements devised from representatives from the White House on news media and TV. Numerous of curves have been thrown about our people.

But, Senator, we have to live tomorrow. We have to live next week a year from now. There are many sufferings on our reservation. We are having a tough battle holding on to that little piece of land that we have left.

As you recall in history, we once owned the entire North American continent. We now have a very small dot on this vast territory that we once owned. We ask you that the Federal trust relationship, the unique trust relationship that we have with the U.S. Government, is strengthened, are once and for all secured henceforth. And before the Central Arizona project begins, before the first dirt is turned over, that we have guaranteed water; guaranteed to all Indians that live along the Gila River area line. We hope that you can do all you can to help us. We know that we live in a complicated world and the complexity that faces us is tremendous. We do not ask or resent that people came over from across the seas. We do not wish to dwell on the past mistreatment of Indian people, but we look to the future and you have brought us hope, some light that we do have a representative at the great White House.

Do your job well and your name will be carried among us very strongly. Thank you, Mr. Senator.

Senator KENNEDY. Thank you very much. Again, I want to thank you, Governor Lewis, for being the host at our hearing this morning.

For all those that do wish to make a comment, the record will remain open for some 2 weeks.

These past 2 days have made many facts clear. One of the clearest is that the Central Arizona project is of primary importance to many native Americans. To the north, the Navajo, the principal feeling was one of fear, as we heard in our hearing in Window Rock yesterday. The Navajo people are afraid that the project will take from them.

And today we have heard another feeling, one of hope, mixed with fear. Fear that the hope for benefits will not be realized; fear that the Indian land will be inundated on the promise of recreation and water facilities that will never be made available to the Indians; fear of loss of land which will be blown away by the winds of time and carried off by the rivers of the white man's greed.

So if the Congress is going to fund the Central Arizona project, we are going to have to have some better answers than we have now. What is more important, the Indian people are going to have to have some better answers. You do not get something for nothing. When you do not know what the something is, and you do know that you are giving up a great deal, then it is time to move very carefully. Before the Indian gives away his birthright, he must be told what he will get.

He must have ironclad assurances of equivalent and equitable benefits, and he must know what the cost to his future will be. It is interesting to see the Bureau of Reclamation has a statement on impacts of the project. You can find the impact on wildlife, on birds, on fish, on vegetation, on fauna, and what the impact will be in terms of fisherman and wildlife fanciers. But, where is the statement on what the project will do to the Navajos and the Hopis and the Pimas and the Apaches. So let's not allow the lawyers and the land operators and the politicians and the bureaucrats the kind of atrocities upon Indians that used to be left to the cavalry. The committee is in recess.

(Thereupon, the hearing was adjourned at 1:30 p.m.)

(The following statements and materials were submitted for inclusion in the hearing record:)

STATEMENT OF THE SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT

My name is Norris Soma. I am Manager of the San Carlos Irrigation and Drainage District, a municipal corporation embracing 50,000 acres of public and private lands in Pinal County Arizona, which along with 50,000 acres of Indian lands on the Gila River Indian Reservation, make up the 100,000 acres included in the San Carlos Irrigation Project. The District was organized under the laws of the State of Arizona on July 16, 1928 for the purpose of complying with Section 4 of the Act of Congress approved June 7, 1924, commonly called the San Carlos Act. Pursuant to which the San Carlos Irrigation Project was constructed.

From testimony which has been or will be given here today I am sure you will readily see there is a critical need and ample justification for acquiring from the Central Arizona Project, supplemental water for the Indian and non-Indian lands of the San Carlos Irrigation Project. For more details substantiating these needs we request permission to file with the committee copies of a statement together with other related material which we made before Assistant Secretary, Harrison Loesch, in Washington on August 27, 1969, also copies of a report on "San Carlos Indian Irrigation Project" dated October 1969 prepared by W. S. Gookin & Associates, Phoenix, Arizona.

We further request the record of this hearing show that the San Carlos Irrigation and Drainage District did not appear before the hearing in opposition to any claim or claims the Gila River Indian Community has or may have against the U.S. Government regarding its rights to the waters of the Gila River and

its tributaries. We do however, respectfully request that in negotiating settlement of any such claims the United States does not in any manner waive any rights the landowners of the San Carlos Irrigation and Drainage District are entitled to by reason of and pursuant to the Act of June 7, 1924 (43 Stat. 475–476), the Landowners' Agreement with the Secretary of the Interior, San Carlos Project: Act of June 7, 1924, the Act of March 7, 1928 (45 Stat. 200–210), the Repayment Contract between the United States and the San Carlos Irrigation and Drainage District dated June 8, 1931, and the supplements thereto, the decree entered June 29, 1935, in the United States of America v. Gila Valley Irrigation District, et al, Arizona, Globe Equity No. 59, commonly known as the Gila River Decree, and the Secretary's Order Defining Joint District and Indian Works of the San Carlos Federal Irrigation Project dated June 15, 1938, as well as any and all other legislation, decrees, agreements, stipulations and orders affecting the rights and obligations of the San Carlos Federal Irrigation Project and the San Carlos Irrigation and Drainage District.

Thank you for your time and should you have any questions I shall be happy to try and answer them for you.

STATEMENT BY SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT AT MEETING WITH ASSISTANT SECRETARY HARRISON LOESCH OF PUBLIC LAND MANAGEMENT ON SUPPLEMENTAL WATER FOR SAN CARLOS INDIAN IRRIGATION PROJECT

The San Carlos Irrigation and Drainage District is a municipal corporation embracing lands in public and private ownership. It was organized under the laws of the State of Arizona on July 16, 1928, for the purpose of complying with Section 4 of the Act of Congress approved July 7, 1924, commonly called the San Carlos Act. That Act authorized construction of a dam across the canyon of the Gila River near San Carlos, Arizona as a part of the San Carlos Indian Irrigation Project, as contemplated in the report of the Chief Engineer of the Indian Irrigation Service submitted to the Commissioner of Indian Affairs on November 1, 1915.

Many of the lands of the San Carlos Indian Irrigation Project have water rights and history of irrigation that is older than any other in the State of Arizona. At the time the San Carlos Indian Irrigation Project was organized the landowners were persuaded by governmental officials to turn their rights over to the Secretary of the Interior to be held in trust. The inducement offered for this action was the assurance of a full water supply which all believed would thereafter be available but which has not materialized. Now that supplemental water will be available from the Colorado River under the Central Arizona Project to fulfill these rights and provide the Project landowners with the benefits they anticipated under the various Congressional Acts of 1916, 1924, 1928 etc., we respectfully request the Secretary to reserve and allocate Central Arizona Project water for the San Carlos Indian Irrigation Project.

By the Act of May 18, 1916 (39 Stat. 129) Congress Authorized construction of the Ashurst-Hayden Diversion Dam for the diversion of Gila River waters to lands in the Gila River Indian Reservation and to private and public lands in Pinal County, Arizona. By this Act a beginning was made toward the construction of a gravity system of irrigation that became a part of the San Carlos Project as authorized by the Acts of June 7, 1924 (45 Stat. 475–476) and March 7, 1928 (45 Stat. 200). The Ashurst-Hayden Diversion Dam was completed on June 30, 1922 having been delayed by World War One. The Coolidge Dam and San Carlos Reservoir authorized by the Act of June 7, 1924 (45 Stat. 475–476) was completed in November, 1928.

By completion of the above works it was anticipated that the 100,000 acres included in the San Carlos Indian Irrigation Project would be provided a full water supply. It was originally estimated that about 80 percent of the irrigation water would be supplied by stored and natural flow waters from the Gila River and about 20 percent would be supplied by pumping from the ground water basin underlying the area. However, the supply of irrigation water has been consistently inadequate and consequently the economic development of the Project has been retarded through its history.

Project records reveal that, from 1934 to 1968 inclusive, the average annual diversion of stored and natural flow water has been but 185,762 acre feet instead of the anticipated 320,000 acre feet and pumping has averaged 91,106 acre feet instead of the anticipated 60,000 acre feet. This pumpage has progressively increased the depth to water. The number of kilowatt hours required to pump an

acre foot of water has increased from 120 in 1934 to 464 in 1968. The available water has only allowed cropping on a limited scale on an average of 58,153 acres of the Project's 100,000 acres. The most acreage ever irrigated in any one season was 81,270 whereas in one year the irrigated acreage was only 40,003.

Over the years many studies and reports have been made for a solution of the water supply and other problems of the San Carlos Indian Irrigation Project.

The 90th Congress authorized the construction of the Colorado River Basin Project. Title III, Section 301 (a) of the Act allows the furnishing of irrigation and municipal water supplies to water deficient areas in Arizona and western New Mexico.

The above Act provides a source from which the water supply of the San Carlos Indian Irrigation Project can be firmed up which would, after nearly 40 years, give the landowners of the San Carlos Indian Irrigation Project that which they had anticipated in the beginning. We feel this could be done with a minimum of 240,000 acre feet of supplemental water. This contemplates that Buttes Dam would be built as authorized under the Act, that the Project's distribution system would be rehabilitated by the installation of lining and pipelines to cut down distribution losses and that pumping be stabilized at a safe withdrawal rate.

Former Secretary Udall in a statement at a public meeting on the Central Arizona Project held January 6, 1969 in Phoenix, Arizona made this statement:

"Another subject of great importance concerns the relationship of Arizona Indians to the Central Arizona Project. As I have said, the authorizing legislation specifically prohibits the use of Colorado River watre for development of new lands except on Indian reservations. This exception was made in recognition of the fact that special assistance is needed by many of our Indian communities. One of the best examples is perhaps the San Carlos Project which has never been fully developed because the actual water supply made available from San Carlos Reservoir has been far less than estimated when that project was authorized.

"The Central Arizona Project legislation provides us with the opportunity to improve and stabilize, at least for a substantial period of time, the water supply for this project and to provide the Indians the acreage of irrigated land which they anticipated when the project was authorized. The improved water supply that will be available to the San Carlos Irrigation and Drainage District will also involve realistic adjustment of the existing repayment contract, as the district was advised in 1965. Many other Indian tribes in central Arizona also can and should be benefited through additional irrigation development both by direct irrigation and through exchange arrangements."

The Board of Directors of the San Carlos Irrigation and Drainage District, is ready to begin immediate negotiations with the Secretary as to payment in accordance with present and past legislation regarding its share of Project costs and to make realistic adjustments of the existing repayment contract, in light of the additional benefits from the Central Arizona Project.

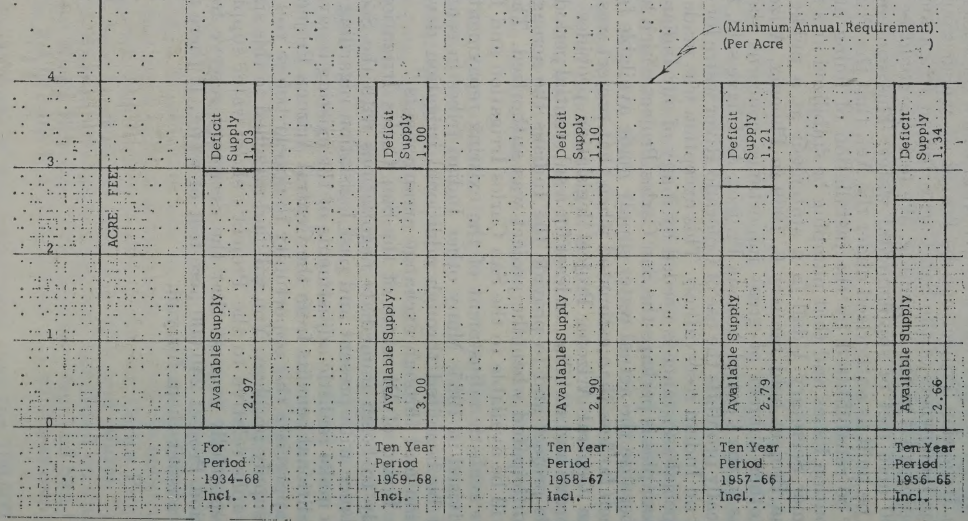
We appreciate this opportunity to appear before you and discuss with you our water supply problem. You will find attached to this statement several comparative graphs relative to the Project's short water supply and irrigated acreages. We respectfully request that the Secretary reserve for the San Carlos Indian Irrigation Project 240,000 acre feet of water. If there are any questions we will try to answer them for you.

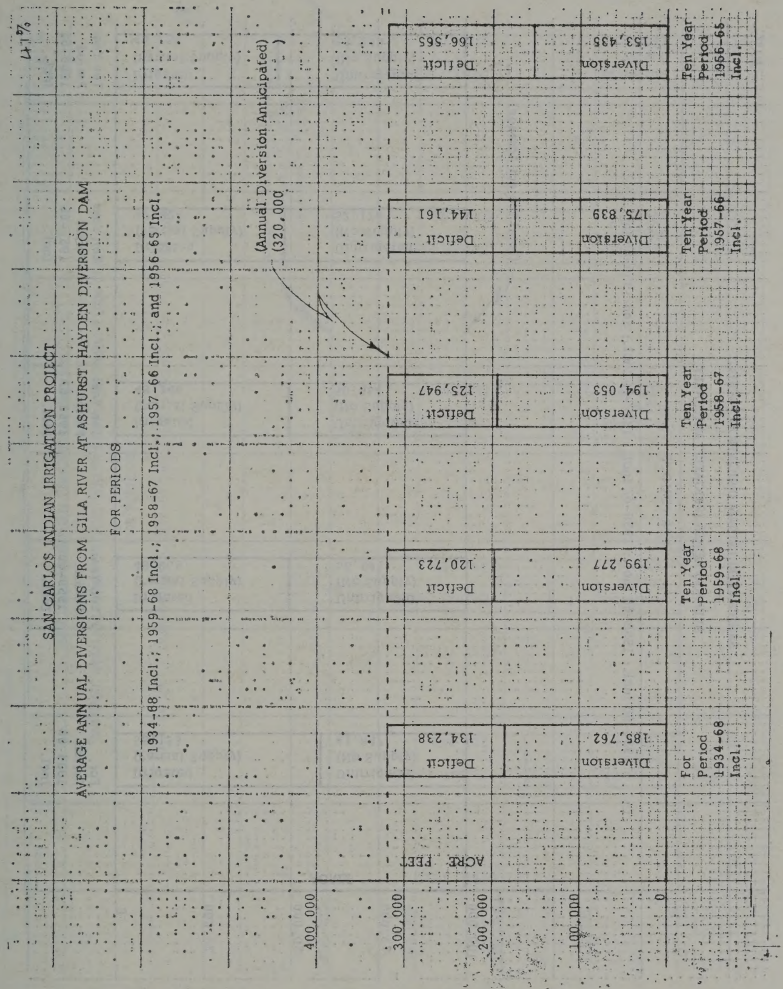
SAN CARLOS INDIAN IRRIGATION PROJECT

AVERAGE ACRE FEET AVAILABLE PER ACRE IRRIGATED

FOR PERIODS

1934-68 Incl.; 1959-68 Incl.; 1958-67 Incl.; 1957-66 Incl.; and 1956-65 Incl.




SAN CARLOS INDIAN IRRIGATION PROJECT
AVERAGE ANNUAL DIVERSIONS FROM GILA RIVER AT ASHURST-HAYDEN DIVERSION DAM
FOR PERIODS
1934-68 Incl.; 1959-68 Incl.; 1958-67 Incl.; 1957-66 Incl.; and 1956-65 Incl.
(Annual Diversion Anticipated) (320,000)
ACRE FEET
400,000
300,000
200,000
100,000
0
For Period 1934-68 Incl.
Diversion 185,762
Deficit 134,238
Ten Year Period 1959-68 Incl.
Diversion 199,277
Deficit 120,723
Ten Year Period 1958-67 Incl.
Diversion 194,053
Deficit 125,947
Ten Year Period 1957-66 Incl.
Diversion 175,839
Deficit 144,161
Ten Year Period 1956-65 Incl.
Diversion 153,435
Deficit 166,565

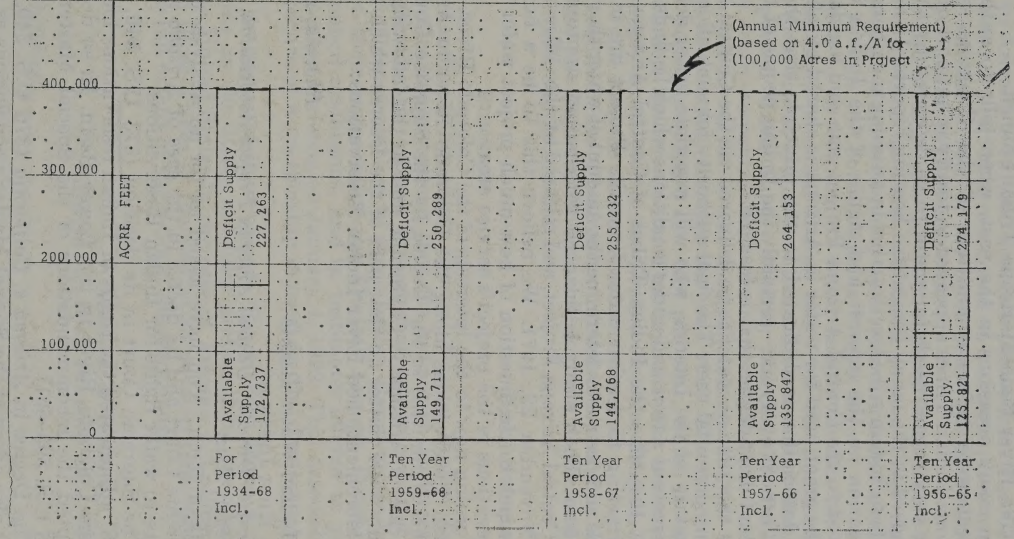
4/86
SAN CARLOS INDIAN IRRIGATION PROJECT
AVERAGE ACRES IRRIGATED ANNUALLY
FOR PERIODS
1934-68 Incl., 1959-68 Incl., 1958-67 Incl., 1957-66 Incl., and 1956-65 Incl.
(Total Project Acreage)
100,000
75,000
50,000
25,000
0
ACRES
For Period 1934-68 Incl.
Irrigated (Partial Supply) 58,153
Unirrigated (No Supply) 41,847
Ten Year Period 1959-68 Incl.
Irrigated (Partial Supply) 49,059
Unirrigated (No Supply) 50,941
Ten Year Period 1958-67 Incl.
Irrigated (Partial Supply) 49,146
Unirrigated (No Supply) 50,854
Ten Year Period 1957-66 Incl.
Irrigated (Partial Supply) 47,824
Unirrigated (No Supply) 52,176
Ten Year Period 1956-65 Incl.
Irrigated (Partial Supply) 46,757
Unirrigated (No Supply) 53,243

SAN CARLOS INDIAN IRRIGATION PROJECT

AVERAGE AVAILABLE AND DEFICIT WATER SUPPLY AT FARM TURN OUT

FOR PERIODS

1934-68 Incl.; 1959-68 Incl.; 1958-67 Incl.; 1957-66 Incl.; and 1956-65 Incl.



1055

STATEMENT FOR THE CENTRAL ARIZONA PROJECT ASSOCIATION PRESENTED BY RICH JOHNSON, EXECUTIVE DIRECTOR

My name is Richmond Johnson and I am executive director of the Central Arizona Project Association. This Association was organized in 1946 by a group of Arizona community leaders for the purpose of advancing authorization and construction of the Central Arizona Project.

Policy of the Association is determined by a Board of 65 directors which at present includes Mr. Hampton Haozous, Economic Development Planner of the San Carlos Apache Tribal Council; and Hon. Alexander Lewis, Sr., Governor of the Gila River Pima-Maricopa Tribal Council.

On many occasions in the past, when bills to authorize the Central Arizona Project were before committees of the Congress, representatives of Central Arizona Indian Tribes appeared to testify in support of the project and to present their very urgent needs for water to be delivered by the project. This is a matter of record in the many committee hearing reports. In addition, attorneys retained by these Indian tribes were active in advising members of Arizona's congressional delegation on the interest and rights of the Indian reservations in Arizona as related to the Central Arizona Project plan and legislation.

The great need for water in Arizona is shared by all of the State's people, and our Association is dedicated to the principle that the Central Arizona Project shall benefit everyone—certainly the Indian people of Central Arizona included—to the fullest degree that is feasible.

At this time no water to be delivered via the Central Arizona Project is allocated to any potential user. The final authority for such allocation rests by law with the Secretary of the Interior, who will negotiate water delivery and cost repayment contracts at a time and under conditions which he finds necessary and appropriate.

At this time the Indian Tribes of Central Arizona which have an interest in contracting to receive water from the Project are in process of studying their needs and desires to determine the amount of water they will want to have allocated to them. Their study is financed with money appropriated by the Congress for the Central Arizona Project, and released by the Office of Management and Budget on November 22, 1971. We believe this to be a fair, sound and constructive approach to the question of how much project water will be allocated to Indian reservations in the project's service area.

Turning now to the interests of the Colorado River, Fort Mohave and Cocopah Indian Reservations along the Colorado River in Arizona, I call the attention of the Committee to the Decree by the Supreme Court of the United States in the case of Arizona v. California, and to the following letter of comment by Attorney Burr Sutter on that part of the Decree which deals with the rights of the the aforementioned River Indian Reservations:

SNELL & WILMER,
Phoenix, Ariz., September 15, 1971.

Re Indian Water Rights
Mr. RICH JOHSNON,
Executive Director, Central Arizona Project Association,
Phoenix, Ariz.

DEAR RICH: You have asked us for an analysis of the decision of the U.S. Supreme Court and its decree in the case of *Arizona v. California* insofar as they relate to water rights for Indian Reservations.

The Supreme Court in its decision (373 U.S. 546, 10 L.Ed. 2d 542, 83 S.Ct. 1468) adjudicated the rights of Indian reservations located along the mainstream of the Colorado River in the Lower Basin. In so doing, the Court upheld and adopted the recommendations of the Special Master as to such Indian rights. (373 U.S. 595–601)

The Decree in *Arizona v. California* (376 U.S. 340, 11 L.Ed. 2d 757, 84 S.Ct. 755) also adopted the Special Master's conclusions as to Indian rights.

The Special Master's Final Report and Recommended Decree dated December 5, 1960 made specific findings as to such Indian water rights. We confine ourselves only to rights adjudicated for reservations or portions of reservations located in Arizona. As to these the Special Master concluded as follows:

1. The Colorado River Indian Reservation was awarded a maximum annual diversion of 662,402 acre-feet from the Colorado River for use in Arizona or to the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 99,375 acres and for the satisfaction of related uses, whichever is less.

2. The Fort Mohave Indian Reservation in Arizona was awarded a maximum annual diversion requirement of 96,416 acre-feet or the quantity of mainstream water necessary to supply the consumptive use required for the irrigation of 14,916 acres and for the satisfaction of related use, whichever is less.

3. The Cocopah Indian Reservation was awarded a maximum annual diversion requirement of 2,744 acre-feet or the quantity of mainstream water necessary to supply the consumptive use required for the irrigation of 431 acres and for the satisfaction of related use, whichever is less.

The aggregate maximum diversion of water allocated by the Master and the Court to these reservations in Arizona is 761,562 acre-feet per annum. The Court allocated water for use on a total of 114,722 acres. Based on a consumptive use of 4 acre-feet per acre for agricultural purposes, the three reservations would be entitled to a total consumptive use of 458,888 acre-feet.

Thus the Indians were awarded an aggregate diversion right of 761,562 acre-feet or a total consumptive use of 458,888 acre-feet, whichever is less. These rights were given a priority as of the date of the creation of each reservation and all must be considered as being prior in right to Central Arizona Project uses.

The Bureau of Reclamation in developing its water supply studies for the Central Arizona Project considered potential Indian uses from the mainstream of the Colorado River. The most recent report is entitled Memorandum Report, Central Arizona Project, Updated Water Supply Studies, March 1971. Table 3 beginning at page 6 of this study recognizes that the rights of Indians on the three reservations above-named are prior to the Central Arizona Project and forecasts water uses on such reservations through the year 2030. The maximum use anticipated during that period is 459,000 acre-feet per year, which is equal to the consumptive use awarded by the Court. This amount was necessarily deducted from the water supply available to the Central Arizona Project. For your convenience, copies of Table 3 in the above report are attached.

It is our opinion that the requirements of mainstream Indian reservations have been amply protected both by the Supreme Court's decision and decree and by the Bureau of Reclamation water supply studies.

Very truly yours,

BURR SUTTER.

SUMMARY

In summary, it is a long-standing policy of the Central Arizona Project Association, on behalf of which I offer this statement, that the Indians of the Reservations in the service area of the Central Arizona Project shall receive a fair share of the benefits of the Project. Representatives of those Indian Reservations have advised your Committee of their support for the Central Arizona Project in officially adopted Tribal Council resolutions, and in testimony offered to your Committee at hearings in Sacaton, Arizona on January 4, 1972. This Association regards their support as evidence of a partnership interest in the Project which we fully respect.

Further, we believe that the rights of the Colorado River, Fort Mohave and Cocopah Indian Reservations on the River are fully protected by the Decree of the Supreme Court of the United States in the case of Arizona v. California; and we offer our support to those Tribes in their effort to develop their uses of Colorado River water to the full extent of their Court decreed rights.

MUSSER & WILSON,
Scottsdale, Ariz., January 14, 1972.

Hon. EDWARD KENNEDY,
U.S. Senator, Senate Office Building,
Washington, D.C.

DEAR SENATOR KENNEDY: In response to your invitation, made to those in attendance at the recent hearing at Sacaton on Indian water rights and other matters, I am pleased to submit the enclosed paper on *The Jurisdictional Aspects of "Indian" Law.* I respectfully request that this letter and the paper be made a part of the Record.

Senator, you are probably pressed for time and may not have the opportunity to read the entire paper. However, I would hope that you will have the time to carefully examine Chief Justice Marshall's opinion in the cited case of *Johnson* v. *McIntosh*, 21 U.S. 503 (1823).

It is doubtful that, as a lawyer, I would have gotten the full implications of this case. I would have said to myself, "That's the law, and so be it." However, as a lawyer *and* an anthropologist, I am deeply disturbed by the basic philosophy declared by Marshall, to the effect that "Christian" nations have an inherent right to take absolute control over "Heathen" lands. In my own mind, this is a horrifying concept. I feel that its implications have become so deeply rooted in the National Conscience that, even today, after almost two hundred years of Anglo-Indian relationships, we are as far apart as ever in understanding one another. At the recent hearings, you kept asking the Indians, in different ways, "How can you possibly rely on mere promises?" "What *can* be done to assure the delivery of water to your communities?" When we have to ask these kinds of questions are we not admitting to ourselves that the game is not so much one of meting out justice, or equity, but of White *versus* Red power? On this basis, up to the present time, there has been no contest.

The suggestion which I now make to you, in order to equalize the ground rules, is to not spin your wheels needlessly, in any attempt to tie down slippery promises. Rather, examine your own conscience (nothing personal is intended) and, if you feel so inclined, sponsor and earnestly work for, a formal Congressional declaration (perhaps a Joint Resolution) concerning basic Indian rights, having the specific purpose of counteracting the philosophies reflected by these earlier court decisions.

I am not advocating that the clock be turned back to 1776. What I am proposing is that we Anglos do an about-face and, with the help of a newly-declared, Congressional policy, learn to view Indian requests, for water, and other things needed to sustain their ways of life, in a more appropriate perspective. Let us sit in his tipi for a change. Basically, the Indian does not ask to be *given* anything. He is only requesting (demanding, if you will) that a small portion of what has been previously taken from him under our Anglo-oriented, legally-declared right of conquest, be returned. Please believe me, there is an agonizing psychological difference between these two viewpoints.

Thank you, Senator, for hearing me out. I would appreciate receiving a copy of your printed Hearings, together with copies of any legislative proposals or other printed materials which may come from these Hearings.

Respectfully,

MILTON S. MUSSER.

THE JURISDICTIONAL ASPECTS ON "INDIAN" LAW

(By Milton S. Musser)

"Indian" Law, defined as the law of the *Rex* as it has been specifically applied to the American Indian during almost two centuries of white contact, is a highly complicated subject, born of a rationale of conquest asserted by superordinate governmental powers over heathen countries. The basis of such law in this Country is set forth in numerous treaties, Congressional enactments, Executive orders, administrative and judicial determinations and, above all these, the Federal Constitution. This legal potpourri extends all the way from the initial issuance in 1496 by Henry VII, the British monarch, of letters patent to the Venetian explorer, John Cabot, and his sons, to discover the "provinces of the heathen and infidels", to Congressional enactments which bestow upon the various States, certain regulatory powers over Indian affairs. While the pathway through the reasoning which has transposed Indian sovereignty into a qualified form of dependency is a tortuous one, it does have certain well-defined markers. It is the general objective of this paper to designate and describe these markers; to demonstrate how they have been developed through time; and, finally, by what is outlined herein, to generate the initiation of a National declaration of policy, possibly formalized by a Joint Congressional Resolution, which will effectively reverse the concept, legally declared, that, as against "Christian" nations, "Heathen" nations have no inherent right to lay claim to the lands upon which their people have walked. Broadly asserted, the markers, to which reference is made, include (1) the declared legal basis for this Government's initial assumption of power over the Indian; (2) Constitutional limitations; (3) this Country's treaty-making power; (4) the plenary power of Congress; (5) Federal jurisidiction *versus* State rights; and (6) the rights and responsibilities accorded the American Indian, to govern himself. Federal case law, and the judicial philosophies expressed therein, will provide the major source material for use in this explication.

From whence originates this Government's power over the American Indian? In *Johnson* v. *McIntosh*, 21 U.S. 503 (1823), the United States Supreme Court

was concerned with the question whether or not Indians had the power to give, and of private individuals to receive, a title to land, which title could be sustained by the courts in this Country. The plaintiffs in the action had claimed the land under two grants, purporting to be made in 1773 and 1775 respectively, by the Chiefs of the Illinois and Piankeshaw Nations, before this Country was vested with its Constitutional government. The parties to the controversy had agreed that the Chiefs were authorized by their own people to execute the conveyance, and that the particular tribes for whom the Chiefs acted were in rightful possession of the land they sold. The Court, with Chief Justice John Marshall delivering the opinion, held that the conveyance in question was without effect inasmuch as the Indians held only *occupancy* rights over the land. *Legal* title was considered to be in the particular country (Great Britain in this instance) whose subjects, under a mandate from the King, had first discovered and then conquered it.

The unwritten rule of the European nations was unequivocably stated by the Court to be that *discovery* of a country " 'then unknown to all Christian people' " gives a right to take absolute possession "notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery" (Ibid., 506). Thus, in 1496, the Cabots were granted a commission by the British monarch to discover countries then unknown to *Christian* people, and to take possession in the name of the King. Two years afterwards, in the course of his voyaging, Cabot *discovered* the Continent of North America, along which he sailed as far south as Virginia. To this discovery, according to Marshall, the English traced their title. The final step in the process, which transferred this title to the United States, was the treaty between these two countries which concluded the Revolutionary War and under which the powers of Government and the right to the soil which had been previously in Great Britain, passed definitively to the United States. By this treaty then, the United States, as a Constitutionally devised legal entity, became the owner in fee of all the land then under its dominion, with all its subjects (the Indians by right of prior conquest, and this Country's first white citizens, by right of a Constitutionally imposed doctrine of eminent domain) being, in the last analysis, mere occupants of designated land segments, rather than holders in perpetuity with vested rights of alienation. Thus, there comes into focus, in this Country, a concept of *sovereignty* residing in our Federal Government, from which all power over property and person is derived.

With respect to Indian rights, this concept of sovereignty must be viewed as a dichotomy between the Indian Nations, *per se*, and this Nation. It would appear from the *Johnson* v. *McIntosh* case, cited above, that conquest by right of International law, involves the transfer of power from one Nation to another, within a whole periphery of inter-relationships extending from that of master and slave (in which there could be complete domination), to a mutual recognition, within certain limitations, of the existence of a continuing sovereignty in both parties. In its application to Indian nations, this problem of allocation of sovereignty has never been entirely resolved. However, again with Marshall delivering the opinion of the Court, its solution was attempted in the case of *The Cherokee Nation* v. *The State of Georgia*, 30 U.S. 1 (1831). In that case, the Cherokee Nation had directly petitioned the Supreme Court for an injunction to restrain the State of Georgia from the execution of certain laws of Georgia which, it was alleged, would have annihilated the Cherokees as a political society and left their lands, which had been assured to them under their Treaty with the United States, in the possession and under the control of the State of Georgia. Under the Federal Constitution, the Supreme Court had been opened to controversies between a State or its citizens, and a foreign state. Therefore, the question which the Court first had to decide, was whether the Cherokee Nation was, in fact, a foreign state and thus entitled to bring its petition before this Country's highest tribunal.

The Court held that it had no such right, being not a *foreign nation*, as such, but more accurately, a *domestic dependent nation*. In the Court's words, the Indians "occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian" (Ibid., 17; also, compare *Ex parte Crow Dog*, 109 U.S. 556 (1883), in which the Supreme Court held that inasmuch as federal laws did not specifically cover the matter in question, a federal territorial court had no jurisdiction over a criminal offense committed in Indian country, by one Indian against another of the same tribe, even though Indians were considered to be wards of the United States, and in a state of pupilage.)

Now, it would appear, that this characterization of ward and guardian has no basis other than as a raw declaration of a conquering power. No evidence has been produced which demonstrates that the Indian nations who, in good faith, attempted to resolve their problems with the white man by treaty, had understood initially that they were giving up their sovereignty in this manner, and becoming *wards* of a superimposed power.

That this characterization of wardship was not even viewed with unanimity by the Supreme Court, is demonstrated by the separate opinions of other Justices in *The Cherokee Nation* case, who contested Marshall's compromise, one declaring it to be foolish to call the Cherokee Nation a State at all, another finding it blasphemy not to recognize its status as a foreign power, and still another, likening the Indians to the Israelites who, while inhabiting desert land that they could never call their own, still retained their right of self-government. It appears, that it is this *Cherokee Nation* decision which has opened the door to a virtual Pandora's box of governmental policies and complex administrative practices, based on what seems to have been an impossible attempt to place naturally repelling objects (the Indian heathen culture and the white Christian culture) in mutually satisfactory juxtaposition. It also makes suspect the many one-sided determinations concerning the American Indian, which have emanated from Congress under its Constitutional powers.

Thus far, we have been concerned with the relationship existing between this Nation and the various Indian nations. However, a third string must be added to the dichotomy. Of mutual concern, is the problem of State rights. While this problem was indirectly present in *The Cherokee Nation* case, the case of *Worcester*, v. *Georgia*, 6 Pet. (31 U.S.) 515 (1832), presented a direct confrontation between the State of Georgia and the Federal Government. Involved in this very important case was the legislative power of a State; the controlling power of the Constitution and laws of the United States; the rights, if any, of a once numerous and powerful Indian nation to a separate political existence; and, the personal of a citizen.

After nearly one hundred and forty years of judicial determinations, this case is still being authoritatively cited by both Federal and State courts. Briefly, the facts presented for determination are that under a law passed by the State of Georgia, which extended its licensing powers over all the lands within its borders, a white missionary, who had been residing on land located within the State of Georgia, but granted by Federal treaty to the Cherokee Nation, was convicted by a Georgia court and condemned to hard labor for four years, for residing on the land without first having received a license from the State of Georgia to do so. Upon the Defendant's petition to the federal court for a writ of habeas corpus, claiming that he was being unlawfully held in the State penitentiary, the Supreme Court (Justice Marshall again delivering the opinion) held that the Federal Government, and not the State of Georgia, had jurisdiction over the lands of the Cherokee Nation. In this decision the Court declared that the Cherokee Nation was "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokee themselves, or in conformity with treaties, and with the Acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States" (Ibid., 561) Except as somewhat later modified, this case is still the law of the land.

At the apex of the "supreme Law of the land" (Constitution, Article VI, clause 2), is the Constitution of the United States. Beneath it, and of equal standing and dignity at that level, are Congressional laws enacted pursuant to the constitutional grants and the treaties of the United States. While the Constitution specifically vests the treaty-making power in the President, he may act only with the Advice and Consent of the Senate, two-thirds of the Senators present being required to acquiese (Constitution, Article II, section 2, clause 2). Essentially, therefore, this power rests with Congress. It is also a well-established principle of our Constitutional law, that a treaty may be abrogated or superseded by a subsequent Act of Congress (see, for example, *Foster & Elam* v. *Neilson*, 2 Pet. 253, 314 (1829), *The Cherokee Tobacco*, 11 Wall. 616, 621 (1870), and *Ex Parte Webb*, 225 U.S. 663 (1912)). The law does not declare that, once approved, a treaty is immutable and shall never be altered or repealed (see, for example, an early Congressional enactment (Act of July 7, 1798, 1 Stat. 578) which provided that treaties and conventions with France were no longer obligatory). Furthermore, while good faith may cause Congress to retain and uphold a treaty, it has been held that a person acquires no vested right to the continued

operation of a treaty, and that everyone is bound to obey the latest expression of the law (see *Hijo* v. *United States*, 194 U.S. 315, 324 (1904)). While it also has been held that specific vested rights previously obtained under a treaty are left unimpaired by its subsequent abrogation (*The Chinese Exclusion* case, 130 U.S. 581 (1889), this apparently does not mean that such vested rights include the right to be proteced by the treaty itself.

It would appear that the earliest foundation for the exercise of broad powers of the Federal Government over the Indians was this treaty-making provision which by-passed State control. Beginning with the treaty of alliance made by the Continental Congress with the Delawares (September 17, 1778, 7 Stat. 13), treaty relations of one sort or another were thereafter established with nearly every Tribe within the territorial limits of the United States (see *Marks* v. *United States*, 161 U.S. 297, 302 (1896)). Also, during this early period, it became a principal responsibility of Congress to carry out the obligations and execute the powers derived from these treaties, which resulted in the enactment of numerous implementing statutes. In 1871, however, about ninety years after the first treaty was consummated, Congress terminated its own treaty-making power (16 Stat. 544, 566, Rev. Stat. sec. 2079, 25 U.S.C. 71), and the cancellation of this power also terminated the power to accomplish the same purposes by Executive agreement. Thereafter, these functions were performed under statutory law and legislative supervision.

A review of the legal impact of the treaty-making power on the American Indian reveals a picture fraught primarily with political, rather than legal, decision-making. Given the power of Congress to abrogate as well as approve a treaty, and despite the stated principle that rights once vested under a treaty cannot be abrogated, there appears to exist a wide chasm into which Indian rights, seemingly initially recognized by treaty, have slowly but inexorably vanished. The stress has been placed more on the right of Congress to abrogate than upon the concept of vested interests. This Government's position seems to have been that while vested rights would be recognized, unfulfilled promises requiring future Governmental action and recognition, would not necessarily be. It is true, that through specific Congressional enactments and decisions of the United States Court of Claims, many claims, based on early treaties, have now been recognized. However, the relief has been by way of the granting of damages in most instances, rather than the return of the Indian to his original status.

Within the context of international relationships one would ordinarily assume that when nations abrogate their treaties with one another, the signatories to such treaties would thenceforth remove their presence from the other's territory and, thereafter, treaty rights over each other's territory would be considered null and void. Thus, land previously encumbered by treaty should reasonably be released to the sovereign power in which such control had initially vested. This was not done with the Indian nations, and it appears to have been political expediency, rather than basic Constitutional law, which was determinitive of this particular state of affairs. To put the matter bluntly, the hard-handed imposition of the concept of the plenary power of Congress to determine Indian rights, over the concept that agreements between Nations are to be mutually concluded, has had the effect of substituting the rule of conquest for the rule of law. With the right to grant and the right to abrogate being considered as the sole prerogative of Congress, the basis for obtaining corrective action of injustices imposed upon the American Indian now has predominantly political, rather than judicial, connotations.

The present recognition by the Supreme Court of the plenary power of Congress over the Indian tribes, as long as they continue to exist as such, and over their tribal power, is now unquestioned. It has been held, for example, that such power cannot be rendered ineffectual by any Indian treaty (see *Choate* v. *Trapp*, 244 U.S. 665, 671 (1912). Also, this power has been held to be exercisable only by Congress, and not by the courts in the absence of enabling legislation (*Sioux Indians* v. *United States*, 277 U.S. 424 (1928), aff'g 58 Ct. Cl. 302 (1923); see also *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 311–312 (1911)). Thus, insofar as Indian rights are concerned, principles of equity which have been long-established under our system of jurisprudence as an appropriate basis for making legal determinations, are non-existent. The United States cannot be sued without its consent and this, can come only from Congress. This power which is vested in Congress has been held to properly extend from the control of the use of Indian lands (e.g., grazing) through the grant of adverse interests in lands (e.g., rights of way), to the outright sale and removal of the Indians' interest (*United States* v. *Seminole Nation*, 299 U.S. 417 (1937)). Although it has been held that plenary

authority does not mean absolute power (i.e., the exercise of power must be founded upon some reasonable basis (see Wise, "Indian Law and Needed Reforms (1926), 12 *A.B.A. Journal*, 37, 38–39, and *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935)), the implied Constitutional requirement that the Indian be made whole is based on the payment of just compensation, not a return to *status quo*. Furthermore, even this right to just compensation is impaired because Congress, itself, passes (and likewise has the power to abrogate) legislation permitting suit against the Federal Government for the payment of such compensation.

The scope of a State's power over Indian affairs primarily stems (1) from the recent termination policies of the Federal Government and (2) from the earlier deeply-rooted historical policy of leaving Indians free from State jurisdiction and control (see *Rice* v. *Olson*, 324 U.S. 786 (1945)). State law has no application to Indian affairs except to the extent that the United States gives or has given its consent (*United States* v. *Forness*, 125 F. Supp. 928 (1942)). The Commerce Clause of the Constitution (Art. I, sec. 8, cl. 3), which empowers Congress to regulate commerce with the "Indian Tribes" is said to recognize their existence as political entities (*Iron Crow et al.* v. *Oglala Sioux Tribe*, 129 F. Supp. 15 (1955)). Under the Constitution, the Federal Government's relationship to the Indian and to Indian tribal entities, from the outset, has been that of National Sovereign (see *United States* v. *Kagama*, 118 U.S. 375, 379–380, which held that the United States has the right and authority, instead of controlling the Indians by treaties, to govern them by Acts of Congress). Interestingly (as reported), despite the Supreme Court's strong assertions that National sovereignty rests with the Federal Government, the State of Georgia did not carry out the Court's mandate in *Worcester* v. *Georgia* (Ibid.) to release a person convicted and imprisoned by the State court for violating State laws which were in conflict with Federal authority (see *Report and Remonstrance of the Legislature of Georgia*, Sen. Doc. 98, 21st Cong., 1st Sess. (March 8, 1830). Also, since that time, other State courts and Legislatures have refused to abide by the implications of the decision. However, it continues to be repeatedly reaffirmed by the Supreme Court.

As matters now stand, without questioning the Constitutional doctrine that States possess complete jurisdiction over their own territories except as limited by the Federal Constitution, and despite the occasional recalcitrance of States to abide by Federal edict, it must be realistically concluded that State jurisdiction in any matters affecting Indians can only be upheld either on the basis of the express delegation or recognition by Congress of some power of Government respecting Indians, or that the situation involves non-Indians to such a degree as to require the assumption of State jurisdiction. For example, in a transaction involving a transfer of restricted property between Indians, where the factors of situs, person and subject matter all point to exclusive Federal jurisdiction, the basis of exclusive Federal power is clear. Where all three factors point away from Federal jurisdiction, the power of the State is clear. There is, however, a difficult questionable area involved when one or two of these elements point to one source of power and the remainder to the other.

Thus far, consideration has been given to the scope of Federal and State powers over Indian affairs. At this point, it is deemed appropriate to inquire whether, under our Constitution, any power presently remains with trival entities to govern their own affairs. In this connection, a review of the pertinent cases affirms that the right of self-government within certain areas has been consistently upheld by the courts. On the other hand, although the Indians' right to self-determination has been also frequently recognized by treaty makers and legislators, it has been intermittently ignored, and even sometimes disregarded by administrative officials. The result has been characterized as "a large no man's land in which government in some instances can emanate only from officials of the Indian Department or from the Indians themselves. Self-government or rule by the Department is the Indian's alternative" (*Federal Indian Law* (1958), 395).

The Supreme Court case which established the doctrine of Indian self-government, also is *Worcester* v. *Georgia*. Even behind the doctrine expressed in that case, however, are the fundamental premises (1) that an Indian tribe basically possesses the powers of a sovereign State; (2) that while conquest, in effect, terminated the tribe's external powers of sovereignty (such as its power to enter into treaties with foreign nations) it did not, by itself, terminate the tribe's internal sovereignty, that is, its powers of local self-government; and (3) while these internal powers are subject to qualification by treaties and Congressional enactments, to the extent that they are not so qualified, they have remained in the

Indian tribes and in their duly constituted tribal governments. As a point of form, it also appears to be immaterial whether such power are expressed through customs handed down by word of mouth, or through written constitutions or statutes. In the last analysis, except as proscribed by the Federal Government, the laws of the Indian tribes owe their sanctioning powers to the will of the tribal members.

The basis for the above propositions is established in the case of *Talton* v. *Mayes*, 163 U.S. 376 (1896). The question presented in that case was whether the Fifth Amendment to the Federal Constitution placed a limitation on the right of the Cherokee Nation to enforce its law which authorized a Grand Jury of five persons to institute criminal proceedings. The Supreme Court, in holding that the Fifth Amendment applied only to the acts of the Federal Government, recognized that the governmental powers of the Cherokee Nation were not created by the Federal Government, and that the judicial authority of the Cherokees was, therefore, not subject to the limitations imposed by the Bill of Rights. This does not mean, however, that Indian tribes are not subject to certain aspects of the Federal Constitution. For example, the Thirteenth Amendment was held to prohibit the practice of slavery by an Indian tribe (see *In re Sah Quah*, 31 Fed. 327 (1886)). The question appears to be whether Constitutional restraints *necessarily* apply to the courts or legislatures of the Indian tribes, and if so, whether tribal law or ordinances are in conflict with such Constitutional restraints.

An example of the application of this concept of "basic Indian rights" can be noted in the case of *People* v. *Woody*, 61 Cal. 2d 717 (1964), where the Defendants (Navajo Indians) were arrested and convicted for using peyote as part of their Native-American Church ceremony, in violation of State narcotic laws. On appeal to the California Supreme Court, the Defendants' convictions were reversed, the court's decision emphasizing the need for protecting a unique self-expression of an ancient tradition. On the other hand, it has been held administratively that the First Amendment to the Constitution does not protect against the religious oppression of tribal authorities (see Memo. I.D., Dec. 3, 1940, holding that 25 C.F.R. 161.87NH (Navajo peyote control resolution) was valid and did not infringe religous liberty). Thus, in the absence of any express federal legislation to the contrary, the members of an Indian tribe must write the guarantees of personal liberty they desire, into their own tribal constitutions. This has already been accomplished in many cases (see, for example, the Blackfeet tribal constitution, approved Dec. 13, 1935, by the Secretary of the Interior, pursuant to sec. 16 of the Act of June 18, 1934 (48 Stat. 984, 987, 25 U.S.C. 476)).

Now, where does the Indian stand today? Under the guidelines established by the Supreme Court, as above indicated, it can be generally concluded that, except as specifically granted by Congress, the States have little, if any, jurisdiction over the resolution of Indian affairs; that despite many successful attempts to breach the lines, Indian tribal governments still maintain a sense of authority over their land and the actions of their tribal members; and, that, in the last analysis, although subject to Constitutional limitations, the Congress of the United States has been generally vested with the over-riding power and authority to determine what, in its legislative opinion, is in the best interest of the American Indian. Recognition of this principle of Congressional superordination has been demonstrated over the years by its approval of major legislation pertaining to the Indian, with no intervening requirement that his consent be first obtained. Federal legislative processes have had far-reaching implications since the Constitutional Congress, in 1789, enacted its first legislation covering the administration of Indian affairs. Operating as a structuring mechanism during almost two centuries of contact, there is hardly an aspect of an Indian's family or social organization which has not, in some way, been substantially and permanently affected by the formalized rules which have been imposed on them under Congressional fiat, in large measure with neither the Indian's consent nor his comprehension of their ultimate meaning. The horror of all this is, that it stems from basic assumptions, legally declared in effect, that Might makes Right, and "Heathen" land is fair game for "Christian" conquerors. A reversal of these assumptions, through a Congressional proclamation, might help to cleanse the National Conscience. Perhaps if this is done, we might all begin asking ourselves (e.g., with respect to the allocation of water under the Central Arizona Project) "What portion of that which is rightfully his, should be returned to the Indian", rather than "What should be given the Indian to keep him off our guilt-stained backs"?

WHITEHILL, BERGER, GIN & KARP, P.C.,
Tucson, Ariz., January 7, 1972.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedures of the Committee on the Judiciary, New Senate Office Building, Washington, D.C.

DEAR SENATOR KENNEDY: I met you just briefly at Sacaton, Arizona, on January 4 during the Indian hearings on the Central Arizona Project.

Mr. Augustine Lopez, Chairman of The Papago Tribe of Arizona, asked that I write you regarding your continued support of Indian water rights.

The Papago Tribal Council has indicated its support of the Central Arizona Project with the *unwritten* understanding from the Secretary of the Interior and the State of Arizona that the Tribes will receive their fair share of water from the Project. We are ever mindful of the broken promises made in the past to the Indian people. The law gives to the Secretary the authority to make the allocation of water; we must rely upon the law and the trusted officials to carry out their duty.

Your suggestion at the hearings that the Tribes should have something in writing is an excellent one. May we suggest that you introduce a bill in Congress insuring the Tribes of their fair share of the water from the Central Arizona Project?

The Colorado River Tribes have a legitimate fear that their water rights will be impaired by the Central Arizona Project. Congress could, by law, also protect those tribes.

We wish to express the Papago Tribe's appreciation for your assistance and will look forward to seeing you again in the near future.

At the time a Report of Proceedings of the Hearings on the Central Arizona Project is released, we would certainly appreciate very much receiving a copy.

Very truly yours,

EDWARD B. BERGER,
General Counsel for The Papago Tribe of Arizona.

ADMINISTRATIVE PRACTICES AND PROCEDURES RELATING TO PROTECTION OF INDIAN NATURAL RESOURCES

TUESDAY, JANUARY 4, 1972

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE
AND PROCEDURE, COMMITTEE ON THE JUDICIARY
Colorado River Indian Reservation, Parker, Ariz.

The subcommittee met, pursuant to notice, at 7:50 p.m. at Parker, Ariz., Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Also present: James Flug, chief counsel; Thomas Susman, assistant counsel; Henry Herlong, minority counsel.

Senator KENNEDY. The subcommittee will come to order. The sights we saw from the air and from the ground today brought out for us in stark relief the challenge and the opportunity facing the Lower Colorado River tribes. As we watched the Colorado River snake its way through the desert to the sea, we could observe the two basic elements of the equation of life in this area. There is land here. And there is water. And the sum should be a productive, healthy, and happy life for those who own the land and have access to the water.

We have seen that the equation can work. It can mean irrigated land for agriculture; it can mean water-based recreational areas; it can mean attractive homesites with beaches, docks, and floats.

But somehow it works for the non-Indian and rarely, if ever, for the Indian. The white developer gets permission to establish homesites on the flood plain. The Indian asks the Bureau of Reclamation for permission to develop the flood plain adjacent to Indian land, and the answer is no, not no with an explanation, just plain no. The checkerboard pattern colors the landscape—flourishing green squares on sections belonging to the non-Indians, who can get the resources to finance cultivation; brown squares where the Indian sections lie covered with brush because the Indians cannot get the startup financing which, once invested, would be repaid many times over.

We have spent the past day and a half with Indians who yearn to have what the Lower Colorado tribes already have in terms of water rights. The wate rrights here are not speculative or tentative or vague They have been inventoried; they have been adjudicated; they have been decreed. They are, in short, ironclad rights, the kind of rights other tribes think would solve their problems.

And yet the situation in this beautiful part of the country shows dramatically that even ironclad rights need sympathetic protection and supportive development. On one hand, the Lower Colorado tribes are threatened with a massive withdrawal of waters of unknown dimensions if the Central Arizona project is built without due regard

for their interests in the waters of the Colorado. On the other hand, they cannot get the help they need to apply the water potential to their land, and live in fear that a "use it or lose it" policy will be involed in fact against their water rights, even though it cannot be applied in courts of law.

Meanwhile, through the magic of "reclamation," Indian lands along the river have been "reclaimed" by the Government from the Indians. Some have been turned over to developers. In some places the Indians are denied access to their own riparian territory. The meanderings of the river course always seem to work to the disadvantage of the Indians, literally chipping away at riverfront areas piece by piece. And so, the waterfront which has been the Indian legacy from time immemorial has now become the property of the Bureau of Land Management, the Bureau of Reclamation, the Burea of Wildlife and Fisheries, and other non-Indian interests.

Why? Why is it that the dice are loaded against the Indian every time they are rolled with water and land as the stakes? Why aren't those riverside homes Indian-built homes? Why aren't those beaches Indian-run beaches? Why aren't those fields Indian fields?

The purpose of these hearings is to try to answer those questions, to determine why the Federal Government, as the trustee for Indian rights and resources, cannot help the Indian do as well as the white man does, not only with non-Indian rights and resources, but frequently with the very resources of the Indian people.

One Navajo told us Sunday night that he had five fingers on each hand, just as every white man has, and that as long as that was so, he expected to be treated as a whole and equal person in every way. Land rights and resource rights are the same for all, and we cannot tolerate a system which preserves and promotes those rights for some and debases and denies them for others.

Before we start, I want to extend a word of apology for our late arrival. Ever since yesterday, when we ran into an extraordinary blizzard at Window Rock, we have been behind schedule. This happened last night and we were about 5 hours behind schedule. Nonetheless it has been a very complete and full 2 days.

And I want to express my appreciation for your patience in staying with us. We have some seven witnesses. Their statements will all be included in the record. Perhaps they would summarize their comments and then for a very brief time at the end, if there are other individual members of tribes, we will listen to them. So anyone who would like to make a comment, we will have a pad over here on the table on the right for them to indicate their names. Unfortunately, we will have to limit each one to about a minute and a half.

We will leave the record open and if you do not want to make a comment this evening, you can submit any written statement that you like, and we will make that part of the record.

Our first witness is Adrian Fisher, who is chairman of the Colorado River Tribes and the Federation of the Lower Colorado River Tribes. We are delighted to have you with us. You were kind enough to join us in the view of the area and the reservation from the plane. We can now proceed in these more formal settings.

STATEMENT OF ADRIAN FISHER, CHAIRMAN OF THE COLORADO RIVER TRIBES AND THE FEDERATION OF THE LOWER COLORADO RIVER TRIBES

Mr. FISHER. Thank you, Senator. Before I get started, I would like to have the chairmen from the four other tribes come up to the table at this time.

They are Mr. Barley from the Cocopah, Fritz Brown, president of the Quechan Tribe, and Frances Stillman, chairman for the Mohave Tribe. Is the Hualapai tribal chairman here too? I believe Clara Brown from the Cocopah Tribe is representing Robert Barley.

Senator, I want to say to begin with, that this meeting pleases me very much. This is the first that I know of, when two Senators have called together all of the river tribes to listen to the opinions and recommendations on Indian problems. I would like to thank the Senators for this opportunity to meet with them, for myself and for the Confederation of Indian Tribes of the Colorado River.

There is no single solution to problems facing the American Indian. Each tribe has a distinct and different problem from the tribe next door. But leaders of the five Indian tribes along the Colorado River met last week to form the Confederation of the Indian Tribes of the Colorado River, because we recognize the many areas in which we have mutual interests, and realize the advantages of united efforts to bring about the protection and full development of our natural and human resources, and the protection of our fundamental Indian rights.

At this time I would like to have Mr. Fritz Brown, chairman of the Quechan Tribe, make his statement. He's traveled a long way, so it's time I give you Fritz Brown.

Mr. BROWN. Thank you, Adrian Fisher, Senator Kennedy and your staff. I appreciate that you have come to us to hear our problems. But due to the fact that I don't have a statement, my vice president will present our problems on the reservation at this time. This is George Bryant, he's the vice president of the Quechan Tribe.

STATEMENT OF GEORGE BRYANT, VICE PRESIDENT OF THE QUECHAN TRIBE

Mr. BRYANT. Thank you. I think we have this in reverse, because I was trying to get somebody to get to the water problems first. But we have other problems on our own reservation which I'll talk about, besides water problems that we have in common with other river tribes.

RESERVATION LANDS

We have problems in connection with our reservation lands. The reservation was created for the Yuma or Quechan people on July 6, 1883, in what was then Arizona territory, by the Executive order of President Chester A. Arthur.

This order was canceled on January 8, 1884. Another reservation area of approximately 48,000 acres was set aside in lieu of the July 6, 1883 order. On December 4 and 5, 1893, an agreement was honorably consummated, supposedly by the Quechan Tribe and duly appointed commissioners of the U.S. Government.

The Quechan Tribe contends that the agreement of 1893 was obtained through fraud, misrepresentation, and lack of equitable consideration. The agreement was again unilaterally altered in various material aspects by the U.S. Congress in its ratification of the 1893 agreement by the act of August 15, 1894.

These changes were never submitted to the Quechan Tribe for their approval, and as far as we know, the tribe was never compensated for damages. In the ensuing years the United States again altered the agreement by various acts in violation of and, to the detriment of the Quechan rights granted under Executive order January 9, 1884.

Continuous research has confirmed these violations and unlawfully and morally wrong acts. This agreement of December the 4th and 5th, 1893, should be declared invalid for its failure of consideration and repugnancy to the Constitution. The 1884 reservation was surveyed and re-surveyed and survey markers were posted as the Yuma Indian Reservation, with "YIR" on the markers. Therefore, we earnestly request the U.S. Government to recognize our entitlement to the reservation area created by the January 9, 1884 Executive order, by nullifying their 1893 agreement, or actions of the Claims Commission, and ratifying the Executive order for the Indian reservation.

As long as this inequitable and conflicting condition exists, the Quechan Tribe is hampered in its efforts toward its social and economic progress. We have a 50-year lease from the Bureau of Land Management on 900 acres that we cannot develop because the agreement stipulates restrictions regarding its use.

We want recognition of title under the trust of the United States by the Executive order of January 9, 1884, without prejudice to our claim to this original reservation area. This land, as recognized tribal land, can benefit our people through economic development. And we have no law and order protection, or hardly any protection for our people since the State of California was given authority for criminal jurisdiction under Public Law 280.

PROTECTION OF INDIAN RIGHTS

Our Quechan community are more law-abiding people than the surrounding towns and communities, and in order to insure the safety of our people we must have adequate law and order enforcement. With this in mind we are in the process of applying for protection under Public Law 280. The consequent harassment from the Imperial County officials has led us to get a suit against them, and we will continue to find ways and means of protecting our people.

Because of political impact and pressure put on our tribe, the FBI and various other county officials should be reminded that they are bound by the trust responsibility of the U.S. Government to the Indians under article 6 of the U.S. Constitution. I think that this amounts to violation of the laws made pursuant to the U.S. Constitution. We, the Quechan, were never approached for approval or disapproval of this State jurisdiction.

From our experience with Public Law 280 we find it wanting for improvement in application on Indian reservations.

We would also like to draw your attention to the results of the President's freeze, which is adversely affecting the Indian's forward

economic progress. Other minority groups have been affected in a like manner. This suspension has handicapped our effort to obtain the tools that are needed to help build our future. It has curtailed the Indian Bureau's effective services to us, by cutbacks in employment and maintenance services.

It has caused, for the sake of stability, unemployment in various departments, thus creating a lack of efficiency. The more affluent groups can withstand this, but minority groups cannot afford this freeze. This is the extent of my statement.

Senator KENNEDY. Fine. Thank you very much.

Mr. FISHER. We will submit all the reports to be made by Mr. Barley, to you, and also a map of the reservation. I have another gentleman who will do the talking on the water situation.

Senator KENNEDY. We have seven witnesses to hear from in about an hour and 20 minutes. I want to be fair to everyone to reserve a few moments, anyway, for people who were not on the official witness list, to be able to make what comment they would like.

So we are going to try to move along as rapidly as we can. We all wish we could spend more time on this. I certainly do.

Mr. FISHER. Senator, I know you have had a rough time. So I will submit a statement for both the Colorado River tribesmen and the tribes, as their chairman. At this time, Mrs. Clara Brown from the Cocopah has a short statement.

(Mr. Fisher's prepared statement follows:)

STATEMENT FOR THE CONFEDERATION OF THE INDIAN TRIBES OF THE COLORADO RIVER BY ADRIAN FISHER, SR., CHAIRMAN

I want to say to begin with, that this meeting pleases me very much. This is the first that I know of where two Senators have called together all of the River Tribes to listen to the opinions and recommendations on Indian problems. I would like to thank the Senators for this opportunity to meet with them, for myself and for the Confederation of the Indian Tribes of the Colorado River.

There is no single solution to problems facing the American Indian. Each tribe has a distinct and different problem from the tribe next door. But leaders of the five Indian tribes along the Colorado River met last week to form the Confederation of the Indian Tribes of the Colorado River because we recognize there are many areas in which we have mutual interests and realize the advantage of United efforts to bring about the protection and full development of our natural and human resources, and to protect our fundamental Indian rights.

I think in the last three or four years, there has been a real awakening on the part of the Indians to the real dangers Indians are faced with in regards to the land and title problems, and this real awakening has brought about—has helped to bring about a climate in this country favorable to a resolution of some of these problems. I think that it will never be possible for Indian people to detach themselves completely from the emotions that we feel about land and water, but I think there is a need for us to approach the problem in a calm and cool manner so that among ourselves we know what we want, and agree on a plan of action to accomplish the things we want. There was never a time in history when the climate was as favorable for decision that we want made with regard to land and water rights problems that exists today.

I think it is essential first to give you a short summary of the problems now facing us.

Before the Eagle River decision by the Supreme Court, it was believed and understood to be that our water rights were not subject to adjudication in State court proceedings or before State administrative agencies. That is no longer the law of the land. As of the date of the Eagle River adjudication, at least as we interpret that decision, it now means we are in a position to find that treaty and statutory rights are subject to determination by State courts, at least in the first instance. We know that all of the tribal attorneys and the concerned people in the Bureau of Indian Affairs are reviewing the matter and trying to develop a

strategy or course of conduct that would permit either the overturning or reversal of the decision in the Eagle River case, or a chance at least, to have that decision modified and limited so that it would not apply to Indian water rights as opposed to water rights it has reserved for itself, that is for purposes such as National Forests.

I think it essential that everyone be extremely realistic now. The State courts, individuals, are going to push to have adjudication made because their concept of progress is one dependant upon settling as far as they can see it; because matters have been held in abeyance; because there has not been any authority, any control, any jurisdiction to use the legal work over Indian water rights. That is changed. The Supreme Court now has said they now have jurisdiction. I think it is essential pending all of the effort, we can mobilize to outeract the effects of Eagle River.

Fact: Life cannot be sustained on American Indian reservations in the Colorado River Basin without water from the Colorado River or its tributaries.

Indian leaders here, I think it is through Indian leadership that the solution to our problems lie, and I think the combination of Indian leadership, the getting together, and the free exchange of information will ultimately help us to at least hold our own with respect to the great water grab that is going on in the Western States now. Water rights, land boundary problems, land title problems, are matters which are dear to our hearts. They are matters that Indian people and those who work with us can get highly emotional about. The emotions of frustrations, the fears that we have all are reflected in the attitudes that Indian people have in the land and water.

STATEMENT OF MRS. CLARA BROWN OF THE COCOPAH TRIBE

Mrs. BROWN. My name is Clara Brown of the Cocopah Tribe, and I'm here today in the absence of our tribal chairman, Mr. Robert Barley, who was unable to be here to testify before your committee due to prior commitments. Mr. Barley asked that I represent my people at this hearing and submit a statement for your review which outlines the many problems facing the Cocopah people.

We, the people of the Cocopah Tribe, appreciate the fact that you have taken the time to come and visit our part of this country. We're sorry that you were unable to visit our reservation and view the problems which my people face.

At this time I would like to submit our maps and prepared statement which will help you to understand the situation as it exists. Thank you very much.

Senator KENNEDY. Thank you very much.

Mr. FISHER. At this time we have Benedict Beecher, who is the chairman of the Hualapai Tribe. Benedict.

STATEMENT OF MR. BENEDICT BEECHER, CHAIRMAN OF THE HUALAPAI TRIBE

Mr. BEECHER. Thank you. First I would like to thank the Senator for coming out and being with us Indian people to hear some of our problems. I'd like to say that I'm interested in some land that was set aside for a school. I'll be brief, since we're trying to move this hearing along.

In the transfer of the Truxton Canyon Agency from its present location at Valentine, Ariz., to the Peach Springs townsite, it is feared that the Bureau of Land Management or some other interest will acquire the 1¼ sections of the Hualapai Indian Reservation now being used by that agency.

This parcel of land has been listed as the Hualapai Indian school reserve and our legal entitlement is dated May 14, 1900, from an Executive order of President William McKinley.

Copies of Hualapai Tribal Resolution No. 2–69 and pertinent papers are attached.

This land has been controlled by the Hualapai Indians prior to the aforementioned deeds and we have no intention of releasing our rights to this land.

On behalf of the Hualapai Tribe, we seriously request that you use your influence in seeing to it that no organization, department, or private party seeks claim to this part of our Hualapai school reserve. Thank you.

Mr. FISHER. At this time we have Ralph Esquerra from the Chemehuevi Tribe.

STATEMENT OF MR. RALPH ESQUERRA OF THE CHEMEHUEVI TRIBE

Mr. ESQUERRA. Honorable Senator Kennedy, I too was with the Colorado River Indian Tribe's chairman and the Mohave tribal chairman at the tour you took of the Fort Mohave Reservation and I think you're basically familiar with the problems the Chemehuevis are confronted with today.

In view of the fact that you do have a limited period of time, I would like to read you one short passage.

In 1940, Congress passed an act which granted the United States all the rights, title, and interest of the Chemehuevi Indians for the purpose of aiding the construction of Parker Dam. Today the Chemehuevi Reservation consists of some 28,000 acres and its eastern boundary is a strip of riverfront land which is claimed by the Interior Department. The Bureau of Sport Fisheries and Wildlife has erected a fence between the Chemehuevi Reservation and the Colorado River, thus denying the Chemehuevi Indians the right to the use of their water. As a result of the construction of Parker Dam the Chemehuevi Indians have lost three of their most valuable assets: Water, river frontage, and irrigable land. As a consequence of this tragic loss the Chemehuevi Indians were forced to vacate their ancient homelands. In turn, the Department of the Interior has leased this land to non-Indians for their personal use.

Thank you.

Senator KENNEDY. Thank you very much.

Mr. FISHER. I believe we have Frances Stillman here. She would like to say just a few words.

STATEMENT OF MRS. FRANCES STILLMAN, FORT MOHAVE

Mrs. STILLMAN. Yes; thank you, Senator Kennedy, for coming our way. I will make it very brief because our tribe has been fortunate in having you come to our land and we've touched on most of the problems. But the only part that you didn't see, and that we didn't alert you to, was the hay and wood reserve that is farther north. And I had thought that when the plane flew over, it would go far enough north that you could look down on it, but I noticed that we turned before we reached that area.

But, anyway, just to make it short, I'll touch on that. You have heard me mention this area before in Washington. We are not sure of our western boundary. Therefore, the lease that touches that part could not be consummated because of the title question. Thus our

tribes along the river find it difficult to lease to people who develop, to bring in income.

And when title companies can't make sure of the boundaries, you can't very well lease your land and have it developed. So this is the area that's in question. I would like to see this western boundary accepted as we, the tribe, want.

The original survey, which we call the George Wheeler survey, sets that boundary, instead of the Blouth survey, which was taken years later to accomodate the Bureau of Land Management. Thank you.

Mr. FISHER. At this time, Senator, I would like to state a few oppositions to the CAP program that we have here in Arizona; that's the Central Arizona project, or what we call the Dry River project, The Salt River and Gila River are good examples of what might happen to the Colorado River. They dried up because the river is used. The central Arizona tribes have decreed water rights, but they're not getting the full amount of water.

Some of the tribes here think that the Central Arizona project will cause migration of people to areas already polluted and undesirable.

And they also believe that there has been no study for the river tribes; water study, that is. They justified the CAP program by mutual agreement, and individual water rights have been determined strictly for agricultural use. I think the cost-benefit ratio is too high. Benefits to be drived from the project are very low.

The more economical use of water is here. The cost of transporting water will make agriculture too high when it gets to Phoenix. I understand that some of the river tribes in Central Arizona are for the Central Arizona project, whether they get any water from it or not. That is what I understand at this time, Senator.

At this time, Senator, I'll turn it over to you or the audience.

Senator KENNEDY. Thank you very much. Perhaps there are some members of the audience who would like to make some comment. I want to thank all of you for filing your statements with us.

We had a good opportunity earlier in the afternoon to visit with Mrs. Stillman and a number of the rest of you. I saw from the air, and from good maps and charts, some of the particular problems. I would welcome some comments from some of the other members of the tribes. I understand that a Mr. Fisher is here tonight, and that he was living on the Chemehuevi reservation when it was flooded. Maybe he could tell us what the Bureau of Reclamation's actions meant to him and his family.

STATEMENT OF MR. JOE FISHER OF THE CHEMEHUEVI TRIBE

Mr. JOE FISHER. I appreciate you awareness of my presence. Here I am branded as a madman.

Senator KENNEDY. That is because you wanted to stay in your home, is that right?

Mr. JOE FISHER. That's right. I've been to the courts, the U.S. Senate, and the Secretary of the Interior; I've been to many places. Now I'm financially broke and I can't make another step. In 1936 in that area, the Government drafted a resolution for the Chemehuevi tribes to sign and they went and defined who the Chemehuevi was.

And on November 19, 1940, approved of that. And later on the 76th Congress of the United States enacted a special legislation

approving all of that. In other words, what I am saying is, when the Bureau drafted this resolution they used that as a buttress before the 76th Congress of the United States.

We have lived up to our agreement, why can't the Government live up to its agreement. Then if I don't get it, I'm intending to go to court, contending that the Government has defrauded me.

I went to many lawyers. I had a good lawyer. He even told me that we were doing this wrong. We're going to get kicked out of court without any res judicata. I'm phrasing this in your terms because I know you're a well-qualified lawyer and I'm not. I just learned this on my way over here. I don't know anything.

Then we have the Secretary of the Interior, who recognizes the Colorado River tribes as descendants of the Chemehuevi Tribe, while the Bureau has said that to recognize the Colorado River tribe as the Chemehuevi would be in direct violation to a long-existing Bureau policy that's been upheld in court; namely the *Mandler* case, which intended the Congress of the United States of America to give one individual a dual privilege.

You have heard a chairman of the Chemehuevi Tribe—could that chairman or anyone of his colleagues or anyone of his group, speak the language that I speak? They have people from Mexico making a claim to the aboriginal rights which I helped institute. So that has been my guide.

And I never did come up with a prepared statement because 30 years is a long time to memorize this.

Senator KENNEDY. Tell me what happened now, you were——

Mr. JOE FISHER, We were there, like I said, when they were going to flood that land for the Parker Dam. The Bureau made a resolution for us to give the Bureau authority to sell that land for us. My name is on the fifth line.

Senator KENNEDY. Why were they doing all this work for you? Did they knock on your door and say, "Here, we have a good opportunity for you. Sign."

Mr. JOE FISHER. Sign or else.

Senator KENNEDY, Or else what?

Mr. JOE FISHER. There is such a law as a right of eminent domain. In other words, their attitude was to hell with you and hurray for me. This is a Bureau that defies the Congress, defies the courts and all of the basic principles of civilized justice, and I should know.

So I've been the victim. Is that justice? I've been wronged and I haven't given up the fight yet. The only means is getting financial aid to go to higher courts. There's a Ford Foundation in the Oakland Bay area which I tried to contact. They were affiliated with California Legal Service, which fought against me. This was an instrument of the Federal Government, which in my opinion is a conflict of interest.

And I've contacted the law office in Albuquerque which supposedly helps the poor Indian in legal matters. What did they do? They sent back all of my papers. They don't want to talk to me any more. Fortunately, as I glanced over this audience, I saw a nice friend of mine who is sympathetic with me and I hope to God that he got his law degree from the Arizona State University and can tell them my problem.

They said, "You've got a case," but the courts never listened to me. They say this is all political and they have no jurisdiction. But I contend that they do have jurisdiction. Now, if I have no jurisdiction, what recourse do I take? I'm asking you that question.

We had allotments on that reservation approved by Warren G. Harding in 1921. My sister and my brothers and my father and mother had a trust on that allotment, of which I have a copy. So, it's an injustice. However, my family and my people, in national emergencies, have made tracks in Normandy, north Africa, and Vietnam.

I had two boys there. Is that justice? I'm a conquered person. Yes; the Indian people are conquered people, but we don't ask any rancor from the Government. When they want us to fight for them, we go and fight.

Senator KENNEDY. Did your sons volunteer or were they drafted?

Mr. JOE FISHER. They were drafted. In other words, let me emphasize this: I saw a cartoon one time about a little boy having a lollipop and the bigger boy got the lollipop away from him. Here comes the town bully around the corner. The bigger boy says, "We both can eat the lollipop, but while you're fighting the bully I'll eat the lollipop and watch." That's the same boat that I'm in.

Senator KENNEDY. Thank you.

Mr. JOE FISHER. I wasn't prepared for this.

Senator KENNEDY. You have done very well for not being prepared. There is a hand up out there.

Mr. HENRY MONTAGUE SR. Yes, sir.

Senator KENNEDY. Will you state your name?

Mrs. GEORGIA CULP. No; age before beauty.

Senator KENNEDY. Ladies before gentlemen.

Mrs. CULP. I was just——

Senator KENNEDY. Could you give me your name?

STATEMENT OF MRS. GEORGIA CULP

Mrs. CULP. I'm Georgia Culp, secretary-treasurer of the Chemehuevi Tribe. You say they are ironclad, adjudicated rights. We thought that the right to our land was ironclad, that it belonged to us forever. Now we're fearful that the Government will do the same thing for our water rights that it did for our land. The one thing that we need is the help of all of those in Congress to keep us from losing any more than we have already lost.

(A prepared statement by Ralph Esquerra for the Chemehuevi Tribe, submitted for inclusion in the record, follows:)

TESTIMONY OF RALPH ESQUERRA

ENDANGERED LAND AND WATER RESOURCES OF CHEMEHUEVI TRIBE

Today, the water and land resources of the Chemehuevi Indian Tribe of California are heavily endangered. This is a tragedy and unfortunately, it is attributed to the conflicts of interest within the Department of the Interior.

On June 5, 1970, the Secretary of the Interior recognized the Chemehuevi Indian Tribe as a legal entity pursuant to the Indian Reorganization Act of June 18, 1934. Prior to this recognition, the lands comprising the Chemehuevi Reservation were administered by the Secretary of the Interior. During that time, the Chemehuevi Reservation consisted of some 36,000 acres and its eastern boundary was the mighty Colorado River. The Chemhuevi Indians farmed the land and raised cattle for a living—there was plenty of water.

In 1940, Congress passed an Act which granted the United States all the right title and interests of the Chemehuevi Indians for the purpose of aiding in the construction of Parker Dam. Today, the Chemehuevi Reservation consists of some 28,000 acres and its eastern boundary is a strip of river-front land which is claimed by the Interior Department. The Bureau of Sports, Fisheries and Wildlife has erected a fence between the Chemehuevi Reservation and the Colorado River, thus denying the Chemehuevi Indians the right to the use of their water. The Bureau of Land Management has leased some of this land to non-Indians and allowed these individuals to benefit for their own personal interests. Consequently, the Chemehuevi Indians have been forced to abandon their memorable ancient homelands.

The Chemehuevi Tribe has adjudicated rights to approximately 11,000 acre-feet of water from the Colorado River. These rights are spelled out clearly in the case of Arizona vs California; however, the Chemehuevi Indians have not and cannot use their water allocation because the Interior Department has denied them access to the Colorado River. The Chemehuevi Reservation consists of arid land which is soley dependent on water if it is to meet the needs of the Chemehuevi people. The Chemehuevi Indians need their water—they cannot survive without it.

The Chemehuevi Tribe firmly believes it is legally and morally entitled to this land and consequently, it has become deeply involved in an endeavor to return title to the Chemehuevi Tribe.

In February of 1970, the Chemehuevi Tribal Executive Committee went to Washington, D.C. to negotiate with the Interior Department the return of the taken lands to the Chemehuevi Tribe. The Tribal Executive Committee explained that the return of the taken lands was essential to the Tribe's endeavors to become a viable selfsustaining economic entity and that it desired the taken lands to be returned immediately. The Interior Department responded by taking the position that without an appropriate Act of Congress it did not have the authority to vest title to the taken lands in the Chemehuevi Tribe. Instead, the Interior Department has proposed to the tribe a fifty (50) year lease agreement for the taken lands provided they will be administered in a manner not incompatible with the purposes for which they are now being administered.

At the present time the Chemehuevi Tribe has no source of income and it is operating on its already exhausted trust funds. A recent landuse study of the Chemehuevi Reservation which was undertaken by the University of California, School of Architecture has indicated that the Chemehuevi Tribe must have possession of the taken lands and the use of its water resource in order to become a selfsustaining entity. Inasmuch as the Chemehuevi Tribe needs the taken lands in order to become a viable selfsustaining economic entity and without these lands the Tribe would be destined toward termination; this proposal has been seriously considered.

The Bureau of Indian Affairs has advised the Chemehuevi Tribe that fifty (50) year leases as such have not proven adequate for the economic development of Indian lands because it is difficult to obtain financing for development on a fifty (50) year basis. The Quechan Tribe is experiencing the constraints of a 50 year lease program.

In this regard, Honorable Senator Kennedy, I respectfully request that you support, if you will not introduce, legislation which will provide for the return of those lands that were taken from the Chemehuevi Tribe through the Congressional Act of 1940. In addition, I am requesting that two (2) million dollars be appropriated by the United States Government for the economic development program of the Chemehuevi Indian Reservation. This economic development program is designed to meet the recreational needs and demands of the metropolitan cities, especially in the Los Angeles area.

Attached is a brief in support of Legislation which provides for the return of the taken lands to the Chemehuevi Tribe. Thank you.

MUNGER, TOLLES, HILLS & RICKERSHAUSER,
LOS ANGELES, CALIF.

BRIEF IN SUPPORT OF LEGISLATION TO RESTORE THE USE AND BENEFIT OF THE LAKE HAVASU SHORELINE TO THE CHEMEHUEVI INDIANS

A. SUMMARY:

Before the construction of the Parker Dam, the Eastern, boundary of the Chemehuevi Reservation was the Colorado River. In 1940, Congress authorized the appropriation of tribal land "designated by the Secretary of Interior" as necessary for the Parker Dam. The Secretary designated land lying between the Colorado River on the east and the 465th contour line on the west. No land above the 465th contour line was designated, nor were the Indians compensated for any land beyond the 465th contour line. Between that line and the Colorado River, the Secretary designated the appropriation of a mere flowage easement over land not permanently flooded. Hence, today the eastern boundary of the Chemehuevi Reservation should extend at least as far as the shoreline of Lake Havasu, wherever that may be

But the Department of Interior has effectively denied the Indians the use and benefit of the shoreline and adjacent land by appropriating said land for a wildlife refuge and for commercial exploitation. This appropriation of the shoreline of Lake Havasu and adjacent land has been contrary to congressional intent and Presidential proclamation. And the appropriation is clearly unlawful under long-standing statutes, as well as unconstitutional.

B. FACTS:

The Chemehuevi Reservation is within the boundaries of the State of California between Parker, Arizona, on the South, and Needles, California, on the North. The Eastern boundary of the reservation has been the Colorado River. The reservation is unallotted and continues to be held for the benefit of the tribe generally.

On February 10, 1933, the United States, acting through the Secretary of Interior, entered into a contract with the Metropolitan Water District of Southern California (hereinafter referred to as "MWD") for the construction of the Parker Dam. The contract provided that the United States would carry out the construction of the dam and that the cost would be paid by the MWD.

After the dam was challenged for lack of Congressional authorization, Congress explicitly authorized the construction of the Parker Dam and ratified all prior contracts connected with the project. *Act of August 30, 1935*, 49 *Stat.* 1028, 1039. The Act did not, however, authorize the taking or acquisition of any land for the project.

It was eventually determined that approximately 20 miles of the Chemehuevi Reservation land adjacent to the Colorado River, from about 10 miles south of Topock, Arizona, to about 30 miles south of Topock, would be flooded at various times up to the 465th contour line. This included the entire Chemehuevi Valley, which was the only rich, tillable soil on the reservation.

The Secretary of Interior arranged for the appraisal of this land by a five-member board composed of one representative each of the Reclamation Service, Bureau of Indian Affairs, the Chemehuevi Indian Tribe, Metropolitan Water District, and a fifth member to be selected by the other four. (See copy of letter from Commissioner of Reclamation to Superintendent of the Colorado River Indan Agency, dated March 25, 1938, attached hereto as Exhibit 1). Before the appraisal was made, however, the Secretary insisted that the Indians agree to abide by whatever value was arrived at by the appraisal committee and approved by the Secretary of Interior. To evidence this agreement, the Department of Interior obtained a resolution signed by eleven individual Chemehuevis, who purported to act for the tribe generally, that the appraised valuation would not be challenged. The resolution did not give consent for the taking of the land. (See copy of resolution attached hereto as Exhibit 2).

The Department of Interior, by letter of E.K. Burlew, First Assistant Secretary of the Department of Interior, established a set of rules to be followed in appraising the Chemehuevi Reservation land. (See letter dated October 15, 1938, attached hereto as Exhibit 3). Incuded in these instructions were:

"5. There may be *areas* needed for the reservoir *which will not be permanently flooded* and in which areas *the District will acquire only a flowage easement, rather than a fee or complete title.* . . . [T]he value of such easement will be the amount

the reasonable market value of such land is depreciated by reason of the existence of such *flowage easement*. . . .

"6. [C]ertain lands remaining in tribal ownership have value that exists only because the lands have been used . . . in conjunction with the lands being acquired. . . . Any such decrease in value [of the unacquired tribal lands] is a 'severance' damage. . . . [I]n determining the present market value of the 'unacquired tribal lands' . . . you should take into consideration (a) *any increment* in the present market value thereof arising from any special benefits . . . *accruing* to these 'unacquired tribal lands' *by reason of the construction of the Parker Dam Project, and* (b) *any increment* in the present market value of these lands *because of probable use in conjunction with rights reserved to the Indians in areas* acquired for the reservoir but *which will not be permanently flooded.*" [Emphasis added.]

In accord with the above instructions, the appraisal committee submitted a majority and minority report to the Secretary of Interior pertaining to the lands requested by the MWD, which included all lands on the Chemehuevi Reservations below the 465th contour line. While these reports were pending before the Secretary, Congress passed the *Act of July 8, 1940,* 54 *Stat.* 744, which provided in part as follows:

"That, in aid of the construction of the Parker Dam project, authorized by the Act of August 30, 1935 (49 *Stat.* 1028), *there is hereby granted to the United States, its successors and assigns, subject to the provisions of this Act, all the right, title, and interest of the Indians in and to the tribal and allotted lands of the Fort Mohave Indian Reservation in Arizona and the Chemehuevi Reservation in California as may be designated by the Secretary of the Interior.*

"Sec. 2. The Secretary of the Interior shall determine the amount of money to be paid to the Indians as just and equitable compensation for the rights granted under Section 1 hereof . . . ." [Emphasis added.]

Pursuant to this law, the Secretary thereafter designated the land which had been appraised by the appraisal committee, adopted the essence of the minority report, and advised the MWD of his determination that it was to pay $108,104.95 to the United States for the flooding of about 7,776.12 acres of the Chemehuevi Reservation (an average valuation of less than $14 per acre). In December, 1941, the MWD made payment to the United States Government for these lands taken from the Chemehuevi Reservation.

In sum, the documentary history of the congressionally authorized taking of property rights from the Chemehuevi Indian Tribe for the Park Dam establishes: (1) that the Indians retained full use and benefit of all lands above the 465 h contour line; (2) that the Indians were only compensated for property rights taken with respect to land lying between the Colorado River and the 465th contour line; (3) that with respect to the land between the Colorado River and the 465th contour line, the Indians retained all use and benefit of the land not permanently flooded, subject to a flowage easement; and (4) that all parties involved in the taking, including Congress, the Chemehuevi Tribe, Department of the Interior, Appraisal Committee and MWD, intended for the Indians to have use and benefit of the complete shoreline of Lake Havasu from the Northern boundary of their reservation to the Southern, and that their compensation was reduced because of this anticipated benefit.

After the Parker Dam taking, on January 22, 1941, *Executive Order 8647*, (attached hereto as Exhibit 4) was issued. The Order directed that all lands owned by the United States within a certain defined boundary, including portions of the Chemehuevi Reservation, were to be reserved for a wildlife refuge. The Order specifically included those tribal lands in which the United States acquired "complete interest" pursuant to the *Act of July 3, 1940,* authorizing the taking for the Parker Dam. It specifically excluded those public lands which were "subject to valid existing rights."

Despite the qualifications noted, the Department of Interior has appropriated virtually the entire shoreline of Lake Havasu within the boundaries of the Chemehuevi Reservation. The Northern portion of the shoreline appropriated has allegedly been used as a wildlife refuge, and the Southern portion has been commercially exploited for the benefit of the United States, not the Chemehuevi Indians. The Bureau of Land Management has assumed jurisdiction over the Southern portion of the shoreline and has leased to concessionaires who maintain and operate trailer parks, campgrounds, and other resort facilities.

Thus, the only tillable soil on the reservation was flooded by the Parker Dam. Since then, the Department of Interior has appropriated the only other valuable real estate on the reservation—the shoreline of Lake Havasu—and has effectively

landlocked the remainder of the reservation. Hence, the Indians have been denied access to water essential to the reservation and relegated to essentially worthless desert land.

C. ARGUMENT

1. *The Shoreline of Lake Havasu and Land Adjacent Thereto Within the Chemehuevi Reservation Have Been Unlawfully Appropriated and Should be Restored to the Use and Benefit of the Indians.*

Initially, it should be noted that the Executive Order 8647 establishing the wildlife refuge was intended to incorporate only those Indian lands in which all Indian rights had been extinguished. This was clearly indicated by including only those tribal lands in which the United States had acquired "complete interests" and by excepting all lands then "subject to valid existing rights." Prior to the taking of the Parker Dam, the Indians' rights to use and benefit from this land existed from time immemorial and, with respect to land not permanently flooded, these rights have continued in existence subject to a flowage easement. Hence, it is clear that the United States did not own "complete interests" in the Chemehuevi lands and, therefore, Executive Order 8647 did not pertain to lands on the Chemehuevi Reservation.

Nevertheless, even if authorized by the Executive Order, the appropriation of the shorelines by the Department of Interior is unlawful. It is well established that the boundaries of an Indian Reservation cannot be changed by executive orders but that plenary power over the Indian Reservations resides in Congress.

"Changes in the boundaries of reservations created by Executive Order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress . . . ." 25 *U.S.C.*, § 398d.

This statute precludes the Secretary of Interior, or anyone else, from taking Indian Lands without the express authorization of Congress. *Healing* v. *Jones*, 210 F. Supp. 125 (D. Ariz. 1962); *United States Department of Interior, Federal Indian Law* 643 (1958). Congress has not authorized any taking of the shoreline of Lake Havasu within the Chemehuevi Reservation. Rather, it authorized only a taking of such land designated by the Secretary of Interior as being "in aid of the construction of the Parker Dam project" (*Act of July 8, 1940*, 54 Stat. 744) and for the following limited and enumerated purposes:

"Sec. 2. That for the purpose of controlling floods, improving navigation, regulating the flow of the streams of the United States, providing for storage and for the delivery of the stored waters thereof, for the reclamation of public lands and Indian reservations, and other beneficial uses, and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the project [s] known as 'Parker Dam' on the Colorado River . . . are hereby authorized and adopted . . . ." *Act of August 30, 1935*, 49 Stat. 1028, 1039.

Thus, the plain language of the relevant statutes makes it clear that the appropriation of shoreline for a wildlife refuge and for commercial exploitation was unauthorized and in contravention of Congressional intent. This becomes even more obvious with the recognition of the judicial rule of construction relating to transfers of property rights from Indian beneficiaries to the trustee—United States:

"To assure the utmost fairness in transactions between the United States and its Indian wards, any intent to deprive Indian tribes of their rights in land, or otherwise bring about the extinguishment of Indian title, either by grants in abrogation of existing treaties or through other Congressional legislation must be clearly and unequivocally stated and language appearing in such grants and statutes is not to be construed to the prejudice of the Indians." *Bennett County vs. United States*, 394 F. 2d 8, 11–12 (8 Ser. 1968). *Accord: The Choctaw Nation vs. Oklahoma*, Nos. 41 and 59, 38 U.S.L.W. 4330, 4333 (Sup. Ct. Apr. 27, 1970); *United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 353–56 (1941); *Leavenworth, etc. RR Company v. United States*, 92 U.S. 733, 743 (1875).

In addition to 25 *U.S.C.* §398d, Section 12 of the longstanding *Act of June 30, 1834*, 25 *U.S.C.*, §177, also prevents the taking of Indian Reservation land without proper authorization:

"No purchase, grant, lease or other conveyance of land, or of any title or claim thereto from any Indian nation or tribe of nations, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution . . . ."

The purpose of this statute is to prevent any taking of Indian lands without the consent of Congress and of the affected Indian tribe. *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). See also, *Bennett County vs. United States*,

394 F. 2d 8 (8 Ser. 1968). The taking by the Department of Interior for the refuge and for commercial purposes was without the consent of either Congress or the Chemehuevis. Hence, its illegality cannot be denied.

Moreover, it is undisputed that the "power of the United States to control Indian affairs is subject to constitutional limitations and does not enable the United States, without paying just compensation, to appropriate lands of an Indian tribe." *Bennett County v. United States*, 394 F. 2d 8, 11 (8th Cir. 1968 *Accord: United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938); Comment, 27 *Mon.* L. Rev. 55, 92 (1965). It is also undisputed that the Indians here have received compensation for the taking of a mere flowage easement on those lands not permanently flooded which lie between the 465th contour line and the former channel of the Colorado River and have not received any compensation whatsoever for lands above the 465th contour line. This is evidenced by the instructions to the appraisal committee and the low price (less than $14/acre) paid the Indians for the land taken. Thus, the appropriation of these lands by the Interior Department is also unconstitutional, since the Fifth Amendment of the Constitution requires the payment of just compensation for appropriation of property to public use.

2. *Congress Has Plenary Power Over Indian Lands and Other Property Owned by the United States and, Therefore, May Make Such Changes As Is Necessary to Restore the Use and Benefit of the Havasu Shoreline to the Chemehuevi Indians.*

Congress has complete authority to manage and dispose of public property and tribal lands.

"It is admitted that, as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare. The United States is now exercising, under the claim that the property is tribal, the powers of a guardian and of a trustee in possession." *Morrison v. Work*, 266 U.S. 481, 485 (1925). See generally, *Department of Interior, Federal Indian Law*, 32–43 (1958).

"Since Congress, under the Constitution, § 3 of Art. IV. has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, even a title equal to fee simple, as in its judgment is just." *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103–04 (1949).

This power has frequently been utilized by Congress to settle boundary disputes. *E.g., Act of March 3, 1875, 18 Stat. 476* (boundary between State of Arkansas and Indian Country); *Act of June 6, 1894, 28 Stat. 86* (Warm Springs Reservation); *Act of June 6, 1900, 31 Stat. 672* (conflicting claims of Choctaw—Chickasaw and Comanche, Kiowa and Apache). Thus, the power to enact the proposed legislation is undisputable.

3. CONCLUSION

In sum, the Department of the Interior has committed an egregious breach of its fiduciary responsibility to the Chemehuevi Indians by unlawfully appropriating for its own purposes the shoreline of Lake Havasu within the Chemehuevi Reservation. This appropriation is unauthorized, contrary to Federal statutory law, and unconstitutional. The power and responsibility for correcting this wrong resides in Congress. For all of the foregoing reasons, we urge Congress to adopt legislation restoring the use and benefit of the shoreline of Lake Havasu and adjacent lands to the Chemehuevi Indians.

MR. C. H. CONSLOR,
Supt., Colorado River Agency.

MARCH 25, 1938.

MY DEAR MR. CONSLOR: This will refer to your letters of February 21, relative to the appraisal of the lands to be submerged by the Parker Reservoir.

The Commissioner of Reclamation suggests a board of five members, including one representative each of that Service and the Indian Office; one for the Chemehuevi and Fort Mohave Tribes together; and one for the Metropolitan Water District, these four to select the fifth member. As per copy herewith, we have advised Mr. Page of our concurrence in this plan, except that each tribe should have a separate representative, to function only in the selection of the fifth member for his particular reservation and during the work of appraisal thereon.

The Chemohuevi Indians have designated Richard Fisher as their representative on the board, and those at Fort Mohave, Hal O. Davidson, with the request that three additional members of this tribe be designated; and both tribes ask that Lemuel P. Mathews be appointed as their attorney in this matter. You will be

advised at a later date on this latter request. The inclusion of three additional members of the Fort Mohave Tribe would make the board too unwieldy.

Each tribe should be given to understand that the appraisal made by the upon approval by the Secretary of the Interior, will be final, and asked to adopt, formal resolution agreeing to abide thereby.

The other matters which you mention will be discussed in the final instructions to the board after its personnel has been approved by the Secretary of the Interior.

Sincerely yours,

JOHN HERRICK,
Assistant to the Commissioner.

Enclosure.

RESOLUTION BY THE CHEMEHUEVI INDIAN TRIBE

Whereas, certain of our Tribal Lands on the Chemohuevi Reservation are to be used for a reservoir by the Metropolitan Water District, or the U.S. Reclamation Service, and

Whereas, the Secretary of the Department of the Interior in appointing and authorizing a board to appraise such lands as the basis of settlement with our Tribe, the board to consist of five members including one representative each of the U.S. Reclamation, Indian Service, Metropolitan Water District, Chemohoevi Tribe, and those four to select the fifth member. Now, therefore, be it

Resolved, That the Chemohuevi Indians, whose signature or thumb marks are attached, agree for the Chemohouvi Tribe that the appraisal to be made by the board, upon approval by the Secretary of the Interior, will be final.

WALLACE FISHER.
MARY LOU BROWN.
WILLIAM FISHER.
MRS. WILLIAM FISHER.
JOSEPH FISHER.
DOROTHY WELSH.
WILLIAM F. EDDY.
LUCY G. EDDY.
JAMES MIKÉ.
HERBERT CHAPPO.
MRS. HERBERT CHAPPO.

OCTOBER 15, 1938.

MESSRS. LLOYD HULBERT, H. P. BUNGER, RICHARD FISHER,
HAL O. DAVIDSON, C. H. GENSLER, C. F. HANSHEY,
Parker Reservoir Appraisal Board

GENTLEMEN: Departmental instructions of May 17 and September 3, 1938, governing the appraisal of the Indian lands to be submerged by the Parker Reservoir, are hereby revoked. In lieu thereof, the Board will observe the following rules:

1. The lands should be appraised at their reasonable market value as of the date of appraisal, or the date of inundation if that be earlier.

2. The criterion to be observed in determining each reasonable market value is that price the land would bring if it were offered for sale by an owner desiring to sell but not obliged to sell and bought by one under no necessity of having it; i.e., where there is an absence of compulsion on either side. In determining this value, sales of comparable land in the vicinity may be considered, including sales to the Metropolitan Water District for the Parker Dam project and related works; provided, that if in the opinion of the members of the Board, any particular sale to the District is clearly out of line with the reasonable market value for such land and clearly shows that the price is a compromise price reflecting the element of compulsion in the sale, the price paid in such sale should not be considered by the Committee as evidence of the reasonable market value of comparable lands.

3. The most profitable use of [sic] which the lands could be put by or for their owners in the reasonably near future, if not taken for the Parker reservoir, may be considered in determining their market value, but only so far an [sic] such prospective use may enhance the market value of the land at the date of the appraisal, or date of inundation, if earlier.

4. Permanent improvements that are a part of the realty should be considered as part thereof in making the appraisal. Improvements that have not become a part of the realty are personal property and should not be appraised.

5. There may be areas needed for the reservoir which will not be permanently flooded and in which areas the District will acquire only a flowage easement, rather than a fee or complete title. In appraising such easements, the reasonable market value thereof should be ascertained. Stated in another way, the value of such easements will be the amount the reasonable market value of such land is depreciated by reason of the existence of such flowage easement. There may be other areas needed for the reservoir where complete title will be obtained by the District, except for certain use rights reserved to the Indians. In such cases, the amount to be paid for the lands will be the reasonable market value of the land, less the reasonable market value of the use rights reserved to the Indians. Severance damages, where they exist, should be dealt with as provided in paragraph 6.

6. It may be that certain lands remaining in tribal ownership have value that exists only because the lands have been used or have a reasonable probability of use in conjunction with the lands being acquired by the Metropolitan Water District; and that this is a value that will not reflect itself in the present market value of the remaining tribal Indian lands when the latter are appraised apart from the lands being taken. Any such decrease in value is a "severance" damage for which the Indians are entitled to compensation, in addition to the value of the lands and rights in lands ascertained as above provided.

To ascertain this value or damage, it must be first determined what lands remaining in tribal ownership have been and are being used or have a reasonable probability of being used in conjunction with the lands being acquired. In such cases these "unacquired tribal lands," together with the tribal lands being acquired, should be appraised as a unit, and without regard to the construction of the Parker Dam project, to determine their present market value.

Secondly, from this value, there should be deducted the sum of (I) the value, as above determined, of the lands and rights being acquired, and (II) the present market value as of the date of appraisal of the "unacquired tribal lands". But in determining the present market value of the "unacquired tribal lands" for the purpose of this calculation under (II), you should take into consideration (a) any increment in the present market value thereof arising from any special benefits, but not general benefits, accruing to these "unacquired tribal lands" by reason of the construction of the Parker Dam project, and (b) any increment in the present market value of these lands because of a probable use in conjunction with rights reserved to the Indians in areas acquired for the reservoir but which will not be permanently flooded. Special benefits are those which directly and peculiarly benefit the unacquired tribal land, or any part thereof, and make it more usable and advantageous and therefore of greater value; general benefits are those which are common to lands in the vicinity generally and not confined to the unacquired tribal lands. The resulting figure will be the severance damage for which the Indians are entitled to compensation.

Instructions contained in Section 2 hereof do not follow the rule adopted by the California courts governing the admissibility of evidence in cases where lands are acquired by condemnation. The California rule is not universally followed throughout the States, there being two distinct rules with respect to the admissibility of evidence of prices paid by an interested party for comparable lands. The Secretary of the Interior, in view of the existence of two distinct rules laid down by the courts, and in view of the legislation under which he is to see that the Indians are paid a fair market price for their lands, is entitled to obtain the best available information to enable him to fix the price. It is for these reasons instructions contained in Section 2 are included.

It is understood that the Board has completed the field work and is new [sic] ready to draft its report, which should be submitted at the earliest practicable date. In case of disagreement, majority and minority reports may be submitted.

Sincerely yours,

E. K. Burlew,
First Assistant Secretary.

EXECUTIVE ORDER 8647

ESTABLISHING THE HAVASU LAKE NATIONAL WILDLIFE REFUGE

ARIZONA AND CALIFORNIA

By virtue of the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497, and as President of the United States, it is ordered that all lands owned by the United States within the following-described areas, comprising approximately 37,370 acres, in Mohave and Yuma Counties, Arizona, and San Bernardino County, California, be, and they are hereby, reserved and set apart, subject to valid existing rights, for the ue of the Department of the Interior as a refuge and breeding ground for migratory birds and other wildlife; and all lands hereafter acquired by the United States within such areas, including tribal and allotted Indian lands in which complete interests may hereafter be acquired by the United States pursuant to the act of July 8, 1940, Public No. 730, shall upon acquisition thereof become and be reserved as a part of the said refuge:

* * * * * * *

Senator KENNEDY. Now, the person just behind you.

STATEMENT OF MR. HENRY MONTAGUE, SR.

Mr. MONTAGUE. Thank you. I won't take all the time. My name is Henry Montague, Sr. I'm from the Quechan Reservation in Fort Yuma, Calif. You heard them speak about the land. This is great, but what good are our lands without water? I think this is the thing that we're determined to fight for to the last. Water is being taken away from us, particularly our reservation. We were established at 48,000 acres plus, which has dwindled down to between eight and nine thousand acres. We still maintain that we have water rights for 48,000 acres plus.

It has been adjudicated by the courts, yes, but I think that the basis used to adjudicate this is not fair. This is not being fair with us at all. I think that the processes being used because of the central Arizona project, are dividing the Indian people. The old saying goes, "Divide and conquer."

This is what they've established and this is what they're doing. At this point I'm almost inclined to say that maybe the hearings were also established to divide us. I think that pertaining to water rights the tribes of Arizona should have been heard altogether in one location, rather than being split as we are. Because we certainly don't know what the people at Sacaton said today, and certainly they're not going to know what we're saying here.

Senator KENNEDY. You know what their position is there? There is no question about what their position is there, in your mind?

Mr. MONTAGUE. One of the things I'd like to point out here is that we Indian tribes all have water rights, and we're determined to hold those water rights. I would echo the voice of Peter McDonald in requesting that a moratorium be set until this question, this clouded issue, be settled.

Then maybe the Central Arizona project can go through if there is water available for it. If not, let's condemn the whole thing. Thank you.

Senator KENNEDY. Are there some other comments?

Yes, sir; give me your name for the record.

STATEMENT OF MR. PETE HOMER, SR.

Mr. HOMER. My name is Pete Homer, Sr. The situation of the Colorado River Tribes has not been presented. There has been tremendous development here since 1964, which amounts to about 58,000 acres presently developed on the reservation. But there still remains a balance of about 47,000 or 43,000 acres more that should be developed.

We still have an irrigation system that has to be completed in order to put water on the land. We have been told by lawyers time and time again that we should develop that land and put it under water just as fast as we can.

We have been stymied up to now because there have been no appropriations made for the completion of the irrigation project here. And I wish to appeal that you use your influence, and do all you can to make it possible for us to acquire appropriations to complete the irrigation system, so that we can develop the whole reservation here and lead our people to self-sufficiency, economic improvement, and economic stability.

That's what the council and people here are all working for, and the chief concern of the Colorado River Council is to see that the remaining lands are developed for their people so we can protect our water rights through usage. Tank you, Senator.

Senator KENNEDY. Thank you. Are there other comments?

STATEMENT OF MR. TONY GONZALES, SR., COUNCIL MEMBER OF THE COLORADO TRIBE

Mr. GONZALES. My name is Tony Gonzales, Sr. I'm a council member of the Colorado Tribes. You heard Mr. Fisher state the tribes' opposition to the Central Arizona water project, and you heard Henry Montaque. He's going along with Peter McDonald for a moratorium on the CAP project.

We all feel the same about it. I think there should be a moratorium on that project until the Department of the Interior comes to an understanding with the Indian people, that the Indian water rights be protected and the boundaries of the reservation be established.

And I think Pete Homer brought up a good subject: appropriations. The reason why we're not using all our water allocations is because we don't have our irrigation construction moneys appropirated by Congress. We haven't had any since 1968, I think.

If we can get some appropriations to construct our irrigation system and have our land boundary settled, I think we can carry on very well for our people.

Thank you.

Senator KENNEDY. Let me just play the devil's advocate for the benefit of this meeting. As for Mr. Montague's comment that the purpose of this hearing was possibly to divide the different groups, let me just say it was a matter of convenience. It would be a lot more convenient for me to walk down from my office to a hearing room and hear the representatives of the tribes, than to travel 3,000 miles out here.

But we would not have had the opportunity to listen to some that have spoken so far and, hopefully, will speak later on. And hopefully, we will be able to take a record back to the Senate.

One of the principal concerns of the American Indian is that the white man is always making judgments about what they feel are the best interests of the Indian. We have heard this expressed time and time again this morning. I do not believe it comes as any surprise to you that the dry river tribes are in favor of the Central Arizona project.

Then what is to be the position of those who are the friends of the Indians? Do we superimpose our judgment? Do we say to the five Colorado River tribes that we will take their position and not that of the tribes that testified this morning who feel that this is the best opportunity they have?

They need additional water desperately, and say they do not want white paternalism, either. Their position is to go ahead with the program and hope that I will go back to Congress and fight for it.

Now, who are we supposed to listen to? Or should the tribes themselves get together in a room and come on out with a position, whether it is this issue or on questions of health or education, and let us know where they stand on it. I mean, what are the friends of the American Indian in Congress really supposed to do?

Are we supposed to scratch around and find which tribe agrees with our own opinions and support those in opposition to others? I would be interested to know what kind of reaction you have to that.

Are you placing an undue burden, so to speak, on the Members of the Congress by saying "Accept our position, or accept Peter McDonald's position about the moratorium?" Or should the Indian tribes get together and come up with a position that they have hammered out? We could then hope that Congress would listen to an Indian position on this issue.

Mr. FISHER. Senator Kennedy——

Senator KENNEDY. Yes, sir.

Mr. FISHER. As I said when we were on the plane, I think that it will never be possible for the Indian people to detach themselves completely from the emotions that they feel about land and water. But there is a need for us to approach the matter in a calm, cool manner and agree on a plan of action to accomplish the things we want.

Senator KENNEDY. How can we find out what you want if the Indian tribes are divided on practically every issue involving their interests? Different tribes have different interests and we take pride in our diversity. This is wonderful, but the tragedy is that the people down in Washington who decide what they think is in the best interest of the American Indian don't take that into consideration. How do you possibly think that you are going to compete with the power interests in Congress? For example, the American Medical Association knows what it wants, the highway lobby and the National Rifle Association know what they want. What do the American Indians want? Well, here in Arizona part of them want the Central Arizona project and part of them do not.

The first thing they say to us is, "Don't superimpose your judgment on us. Let the Indians decide." Well, I am confused about what they want. How are those who are truly interested in trying to help and

assist in the Congress to insure that the rights that are inherently guaranteed to the American Indians, which have been abused and violated for 100 years by the Federal Government, are not going to be abused for another 100 years? And although I accept Mr. Montaque's point that those opposed to Indian rights want to divide Indian people. What advice can I take back to the Congress?

Mr. FISHER. I can't give you any advice right now. We have called all the Dry River tribes, Fort McDowell, Salt River, Gila River, Akchin, to discuss the Central Arizona project on January 10 at 1:30 p.m. in this office.

It's just going to be Indians and we'll work it out because we won't have a big fight in front of non-Indians. Then I will probably be able to let you know what happened.

Senator KENNEDY. All right, there is a hand up in the back.

Mr. PHILLIP SMITH. You are asking about how we can settle this water question. Now, the Colorado River Tribes are not fighting the dry river Indians. We are trying to keep the CAP from building because we fear that they are using the Indians to get the Federal Government to help them. What happened to their Salt River water rights, what happened to the Gila River water rights?

Senator KENNEDY. I listened to the spokesmen for those tribes testify in favor of the project this morning. Now, am I supposed to accept what you think is in the best interest of the Salt River and Gila River Tribes, or what they say is in their best interest?

In playing the devil's advocate with the Gila River Tribe this morning, I reviewed the history and asked them why they feel that they will get water because of an oral agreement. They do not have a law. They do not have a decree or a court decision.

You, on the other hand, have court decisions on your water rights. They have been established. I think, as Mrs. Culp mentioned, that you are correct in pressing Members of Congress, the Senate, and Federal officials to protect those established rights.

I think that is wise. But if those people and their elected tribal leaders are willing to say they want the Central Arizona project, am I supposed to accept your wisdom about what is in their best interest or am I supposed to accept their view?

Mr. SMITH. What guarantee has this CAP given to the Dry River people? None.

Senator KENNEDY. That is the same question I asked them. They feel that although it isn't a guarantee, it is a commitment, and that they will be better off. This is their position, and they want me to fight for appropriations for the Central Arizona project when I go back to the Congress of the United States.

Mr. SMITH. We are presenting our problems to you.

Senator KENNEDY. Sure, but you do not want a white man making Indian decisions. You want to be making the decision. The dilemma for me is that I have listened to Indians say that they want the program, and Indians tell me this evening that they are against the program.

What can I do as a friend of the American Indian? Wouldn't it be better if the trustees had gotten together and resolved this, and confirmed an Indian position, made by Indians without the help of the BIA or any other organization?

Mr. FARRISON. Senator Kennedy——

Senator KENNEDY. Yes sir.

STATEMENT OF MR. WILLIAM FARRISON, ARIZONA STATE LAW SCHOOL

Mr. FARRISON. Thank you, Senator. My name is Bill Farrison. I am a senior law student at Arizona State University. I have been trying to remain neutral in this conflict. However, it becomes very difficult because I am an Indian, also.

Senator, I would submit to you that you have a perfect example presented to you of what can occur when we talk about the Salt River and Verde River Apache Tribes. This concerns the Salt River agreement, an agreement made up and put forth by the Bureau of Reclamation.

I understand that the BIA, private attorneys, and primarily the Salt River Project Association, asked the tribes to waive their sovereign immunity and make themselves amenable to adjudication of any dispute that arises on the Salt River in consideration for a guaranteed amount of water for them.

The guaranteed amount of water is not very good. In other words, the White Mountain Apache gets something like 30,000 acre-feet per year. As they further develop their reservation they are going to need more. All five tribes involved, as was pointed out by the White Mountain Apache, Fred Beneshing and by the Yavapai Apache, did not understand what was going on. They were relying upon the words and advice given to them by the people they normally turned to for advice. This was primarily the Bureau of Indian Affairs and various attorneys throughout the State of Arizona. It may seem incongruous to you and it's unbelievable to me that these tribes would sign away these very valuable rights and powers for something that they already have. But they did it.

Now they came before you this morning asking you to take a new look at that Salt River agreement. They are becoming more sophisticated. They are becoming more aware of what they are giving up and what they are not receiving.

Actually, to me, it's a prime example of the quandaries that can result, and the thing that has led to your confusion in trying to consider the Indian problem.

And you're not giving it an in-depth analysis, if I might be critical in that. In other words, you have to look beyond the words and look to see what's going on underneath.

Senator KENNEDY. How do you stand on the Central Arizona project?

Mr. FARRISON. No question where I stand. But I have to go directly against my chairman.

Senator KENNEDY. Which tribe do you belong to?

Mr. FARRISON. Papago. And I've been in a lot of hot water over that.

Senator KENNEDY. You are opposed to it?

Mr. FARRISON. Well, I have many questions, and the questions that I have, in legal terms, are pretty unpopular in the Central Arizona tribal area. I can stand up here and talk in depth about one matter because I've studied it in depth. But I'd just be taking up your hearing time.

Senator KENNEDY. If you have something written and you want to submit it we would welcome it.

I would be very interested in what you have. Please file it with the committee and it will be made part of the record.

Mr. FARRISON: I will submit it in written form.

Senator KENNEDY. That will be good. Yes sir.

STATEMENT OF MR. DWIGHT LOMAZESAA

Mr. DWIGHT LOMAZESAA, SR. Senator Kennedy, you mentioned the confusion and negative feelings against the central Arizona project. Practically every reservation has an agricultural need for water and related things. We have at Colorado River here less than 60,000 acres under irrigation today, with water rights for 107,000 acres. With well established water rights and with each reservation developed using its water properly, there wouldn't be too much opposition to the Central Arizona project.

INDIAN WATER NEEDS

But it scares us to hear in the paper from knowledgeable people that there is only so much water in that river. Yet they're going to build a big project to transport about twice as much water as is available.

So we wonder where this water is going to come from. Our attorneys advise us there is no water at all in the project. California is not through fighting Arizona yet in that case. Most of them do not have enough water yet for the full development of their resources. So if we don't have water being used properly, the feeling against the Central Arizona project is going to split the Indians.

We along the river are fortunate to have water rights. Some of us along the river are not against the dry river tribes, as we call them in the central part of the State. But I think if we could get the funds and everything that it takes to fully develop our resources, and put this water to use, we'd feel a lot safer.

We don't care where they build the project or where they get the water. However, I'm in favor of a moratorium, just for the purpose of finding out how much the Indians need. Nobody's done that yet. In the Feather River matter, they spent a lot of money to study how much they needed.

Nobody's made a very good study for Indian water needs in connection with the Central Arizona project. We need this moratorium to be able to determine these needs. This reservation is a little over a quarter million acres and there is water for less than half of it.

I'd like to comment on other issues that I understood you thought might be handled administratively to help us out. We need additional hospital facilities and things like this.

BOUNDARIES

Oh, God, I could go on and on here. But the one I want to touch on is our western boundary. Seventy-five percent of the reservations throughout the United States have some sort of boundary problem. Even though this reservation was established in 1865, it's a dirty shame we don't know where the other corners are.

We got a little dab of it straightened out a few years ago and the battle is harder and harder to fight. First, vacancies in the Bureau of Indian Affairs need to be filled. These are the people we contact for our problems, to help us out. Why can't they be filled, especially the ones that do not take new appropriations? We have vacancies right here at this agency of approximately 80 people, both in its power and irrigation sections that can be filled.

The money is appropriated. All I think it would take is some administrative decision to allow us to fill those vacancies. This is denying jobs to members of our tribes locally. The money is coming in from revenues and they can be filled. But yet under the freeze on all employees, we're stuck and it's hurting us. I think it is worse for the Colorado River, though we did not have time to show you the boundary today. Today was the first time the Government, after fighting the squatter problem for 20 years or so, finally evicted one of the main principals in it. Maybe this has broken the back of the rest and they will get out and get off our land.

This is a battle that has been going on for years just because we did not know where our boundaries were. But I think you need to pursue the idea of trying to find out the four corners of all the reservations. Maybe the Senator can help us in this matter.

APPROPRIATIONS

And I think it takes money to help us. I think if we had $30 to $35 million, maybe over a period of 5 to 10 years, and guaranteed, we could start a program of full development and we would be able to live with ourselves. A little bit would be needed for administrative purposes and public health, and things like this.

But lack of money has held us back. This project is one of the oldest in the Nation. The first appropriation was over 90 years ago. I think if we get our land developed and water on it, and get our power, roads, schools and everything else, we can compete with anybody.

Then Central Arizona can build its project. Thank you.

Senator KENNEDY. Thank you. Is there another comment?

Mr. ALCAIDA. A study needs to be made of the water needs. Thank you for coming and I wish we had more time to show you some of our area. We're proud of our area, like every tribe is proud of its reservation. Each tribe has lots of problems to talk about, but you have to go into detail. It takes time to get into these things.

Mr. Fisher, he said it's not understood. Maybe he knows what he's talking about. Thank you.

Senator KENNEDY. How about some of the younger people here. Yes, sir.

Mr. SMITH. You said you wanted to know—my name is Edward Smith. You said——

Senator KENNEDY. I have a pretty good idea what I am going to say.

Mr. SMITH. Are you going to go back to Washington and say, "Hey, let's dry up the Colorado River," because of what you saw in Needles. But have you ever been to Yuma and seen where the water is only that deep?

Senator KENNEDY. I have, as a matter of fact.

Mr. SMITH. When the Central Arizona project starts pumping, is there going to be water down in Yuma? I read a report prepared by a man in the Bureau of Indian Affairs who says there's not going to be enough water in the year 2000, and that the Arizona project is only going to run at half capacity. Also the Los Angeles aqueduct is only going to run at half capacity. So do you know if is there enough water coming down that river? Who is going to suffer, the Indian? Are they going to give our water to Arizona so they can keep that project going? This is what I'd like to ask you. Are you going to go back to Washington and say, "Let's dry up the Colorado River."

Senator KENNEDY. There is no question in my mind about the priorities between Indian and non-Indians. The question that I was trying to raise was between Indians.

It is very clear who has the prior rights. Certainly you know my position on that. There is, really, an issue between Indians, however. Someone in the rear has a comment.

Mr. BENSEL. Senator Kennedy, my name is Herb Bensel. I'm a member of the Chemehuevi Tribal Council. As far as Indians opposing Indians, I think that it's unfortunate, but this has to be so at certain times when there is a divergence of opinion. And I think that if I were an Indian living in the drier areas of Arizona, I certainly would want water brought into my area.

But where does it come from? It has to come from someone else who has adjudicated rights, and we do not want to lose them. So I don't think that the Indians living away from the river, who have no rights as far as the water is concerned, can say, "Well, you give me your water."

And I think that is exactly what Mr. Alcaida said, that it appears that the Central Arizona project has been over-subscribed before it has actually begun. And that a thorough, in-depth study should be made to determine if the water is there for those people to be able to use without shorting the tribes that have already received those rights. I think that's the question. Thank you.

Senator KENNEDY. Thank you, Mr. Bensel. Yes, ma'am.

Mrs. OTERO. My name is Janette Otero from Fort Mohave. I don't have the answer as to which set of people to listen to, but the reason I object to the CAP is that we can't use it because of conflicts of interest in the Interior or other agencies or any department. We want to use it, but we can't.

And I'm afraid this is what's going to be taken without explanation. We can't say, "Use it." If I knew the water was going directly to them, I would say yes, but they can't even clean house on on their reservation, they're going to bring in another dirty house over here. Who's going to clean it up? Start with one mess here before you go to another place.

Senator KENNEDY. Thank you. Yes, sir.

STATEMENT OF RALPH ESQUERRA

Mr. ESQUERRA. I want to make a statement here. I've been with the Indians of the Hualapai Reservation from 1925. All of these years the Hualapais have been on this river that your'e talking about.

I'm going to make this statement to you now. I've been with this committee all this time and I'm going to say it again. I've said it in Tucson and I'm going to say it to you people again.

Now, for my reservation, the Hualapai Reservation, the Reorganization Act says that you gave us water rights to all seven streams flowing out of that reservation and going into California.

Where did the Hualapais ever get their money from that water? It's still flowing year after year. Now, do you think that we Indians are lying about our statements in this? No, sir. So, I want you to bring this up in the Congress of the United States; to open this up for us to use.

I was the one who tried to build that bridge cayon dam for the Hualapai people. What did the conservation people say to me? They pulled my dam down. I've got no water. That's what we're fighting about. I'll show the river to your committee and what streams are flowing in there to make up the river. There's seven of them.

My lawyer is a friend of mine but doesn't want to take those things up for the Hualapais, so I'm asking you.

Now, where did the Hualapai get anything out of it? Think of it. So let this be a reminder to you from the other Indians.

Senator KENNEDY. Thank you. Yes, sir.

Mr. SHELDON SMITH. Mr. Kennedy, you asked a while ago what advice the Federation could give you when you make your recommendation with respect to the CAP. Looking at it from a national point of view, it is obvious that a project such as the Central Arizona project will encourage migration of people to the already polluted urban Tucson and Phoenix areas. Everyone knows that these cities already are polluted.

And the city of Los Angeles is a prime example of what a project like CAP can do. Looking at it from the point of view of the people of the Southwest, a project such as CAP would not be in their best interest. Thank you.

Senator KENNEDY. Thank you. Yes, sir.

STATEMENT OF HARWOOD JENKINS

Mr. HARWOOD JENKINS. I used to belong to what we call the special committees on the Chemehuevi affairs. I joined this committee for one purpose, the Chemehuevi. The committee had two axes—two judgment funds, one close to $1 million and another of $175,000 at that time. These are two separate funds.

And I joined this because I felt it would be a service to my people of Chemehuevi descent. But I learned that this committee was instigated by the Indian Bureau to fight a minority group of Indians. I'm hotly sure about that.

Just last week I read a letter to the editor in the Parker newspaper. They must have received it from the Indian Bureau out of Phoenix. It points out that some people in my tribe are quitting the Indian Bureau because the interest money from the judgment fund is being used by the Chemehuevi council for its own purpose. I don't know too much about this but the Indian Bureau wanted to draft a resolution to dissolve the committee which was recognized by the Interior Department.

At one time they set aside $10,000 out of our judgment fund, and when I was on this committee, we were using some of this money to organize the Chemehuevi tribe.

Our people didn't vote to do such things. We voted to be paid for capital payment when the time came. I also heard that we had money for planned programs.

This is not true because we didn't vote money on planned programs. We didn't vote planning for building a school or church, but to organize the tribe. And I went with Mr. Fisher to the court in L.A. Some of the group that were with me on this special committee were greedy, selfish people from the Los Angeles metropolitan area. These are people without a reservation. These are people who don't know what it's like to be an Indian. These are people who don't know what it feels to be an Indian. They don't know how it is to be poor like an Indian.

What I'm trying to get across to you is that there were three on my side on the committee. The committee was composed of about 12 people. We were always outalked and outdone. We were put down. They were going out to all the people of Chemehuevi descent and saying: "Let's do something with our reservation; let's develop our reservation." But still I'm a registered member of the Colorado River tribe.

Why were we used to draft a constitution for the Chemehuevi Tribe when it didn't exist, and to vote on the constitution and bylaws, to the prejudice of a minority group, a band of Chemehuevi Indians? I don't understand this.

INDIAN LEGAL SERVICES

How did it ever get by, how it was ever done? It was never explained to me. We had a lawyer from the California Indian Legal Service. He never let me know what was going on most of the time. I don't know why. I belonged to the group, but I was talking to Bill Fisher, a Chemehuevi agent. I felt that it was fair to explain what we were doing but they wouldn't let me know what was going on and somehow learned that the California Indian Legal Service lawyer was visited by the Indian Bureau. I remember one time we met at the hotel. I walked in the meeting room and he said Berkeley is mad at the California Legal Service assistance to the Chemehuevi Indians for going above our expenditures. CILS asked the Indians for $200 per month to give our people service.

We voted not to give $200. But they were still operating there with us. I don't know where the $200 came from, but I think this is all bureaucratic to keep a single band of Chemehuevi Indians. I always tried my best to help these people.

I tried to contact the Honorable Congressman, Jerry Pettis. He tried his best, but I think he also got his from the Indian Bureau. He's not really hurt but he's put down.

But I would like you, when you go back to Washington, to see that there's justice for this man and his band of Chemehuevi Indians, the true Chemehuevi Indians. I know that these people on the council were also on the special committee with me. I didn't join their tribe. I'll never join their tribe because of injustice to a small band of Indians.

I hope you will talk this over with Congressman Jerry Pettis. He knows me, but he doesn't listen to everything. If you want to do something, help this man. This is what I'm asking for. Thank you.

Senator KENNEDY. Thank you very much. I would be glad to do whatever I can. I want to make very certain at the outset that my presence here is not going to resolve the problems of the Colorado tribes or individuals. I would not want anyone to believe that this is the case. But I have a very sincere desire to try to find ways in which at least this Member of the Senate can be helpful, useful, and effective in assuring protection of the Indian rights. I will be glad to try and help in every way, but I cannot give you the certain assurance that we are going to achieve the final determination in the way that you and he would want it but we will try.

May we have a final comment? Yes, sir.

Mr. JENKINS. My name is Harwood Jenkins, from Fort Mohave. It seems to me there is internal strife among the Indian tribes over the water caused by non-Indians again who are associated with the project.

The Colorado River was measured by some people that are specialists in water. They stated that there were 7.5 million acre-feet in the actual flow of the Colorado River. So Arizona has 2.8 million acre-feet and California has 4.4 million acre-feet.

Now, if you add these two numbers together and try to make Arizona project go through, that's all you have. They've never come out and said that you have excess water. There is no excess water. This is Indian water they're talking about and I think people have never ever come out and said this much water is flowing in the Colorado River.

Mrs. Culp made a statement and I believe that she should come out with a figure on the actual flow of the Colorado River, to see if there is enough water. And the dry area Indian tribes should not feel that they re being pushed aside. They should find out if there is water enough there.

Everyone here should stop and think if there is water available. The Central Arizona project is not for the Indian, it's for the white man. He wants to make money, that's what he wants to do. What's going to happen if this project is made and completed? The people in Arizona will be paying 50 percent more for their water than they are paying for it today.

I'll ask the Indian to stop and think for himself and find out for himself instead of listening to somebody who's using a shrewd method to do this project. I was picking on people on the councils. They know who is weak and who is strong, and they should calm these people down and think for the people. They're the representatives of the tribe, and that's who they're supposed to represent.

Our job is the welfare of that tribe. You heard my chairman here speaking about the western boundary line of the Hay and Wood Reserve. Our problems came about when California made an application for certain land in the Hay and Wood Reserve, which was approximately 310 acres. The application was presented two times, and then about the third time it was granted by some judge in California.

California claimed this Indian land as swamp land and overflow, which they said it was under the 1828–50 Swamp Land Act, claiming that it was not fit for cultivation. Today we of the tribe have lost thousands and thousands of dollars going into court.

Now the court, or the hearing judge has made a decision to deny California application. But the administrative part is up to the Secretary of the Interior. He must recognize that the Willard survey, 1869 California application, went on the 1828 Blouth survey. But we want this cleared.

This could be done by the Secretary of the Interior, but I wish you would make some kind of effort to see that we can have our boundary line cleared up.

Senator KENNEDY. Thank you very much.

Well, I want to thank those who have been kind enough to make a statement and comment, for staying with us this evening, and for your undivided attention and interest. If the Federal Government had been protecting and guaranteeing Indian water rights as it should have been, as it is charged to do under trust agreements, court decisions and statutes, this issue wouldn't be raised this evening. The people of the Lower Colorado would realize that when the Federal Government made a commitment and the Supreme Court reached a decision, that they would get water. The people of the dry river area would recognize that the commitment of the Federal Government would carry with it the assurance that they would receive whatever they were entitled to.

But the real tragedy and the reason that there is this kind of diversity is because the Federal Government has not lived up to its responsibility. It has not lived up to it in a thousand different parts of this country, in a hundred different ways.

We have seen in a very dramatic way, be it in reclamation areas or diversion of the Colorado River, the lack of financial support to Indians to develop their reservations. Priorities are given to non-Indian programs. We find example after example where the Federal Government has failed the American Indian. We have seen today, in our hearing in Phoenix, as well as here, a very deep sense of apprehension and distrust, as well as some hope for the future. I know that the question I posed for you earlier this evening is extremely perplexing to many of you. To me it seems a heavy indictment of this Government of ours, over the entire period of its existence, for failure to meet its responsibilities to the American Indian. That is why there is Indian apprehension and distrust, and the record of the Government is shameful. The requests that are being made by the Lower Colorado tribes are to insure that there are going to be adequate resources available. This makes sense.

Before hundreds of millions of dollars of taxpayers funds are expended to build a project, it makes some sense to study all of its environmental impacts. This cannot be done without first considering what is going to happen to the American Indian.

We cannot let bureaucrats, lawyers, politicians, and wheeler-dealers commit with words, the kind of atrocities upon the Indians which the cavalry used to commit with weapons 100 years ago.

I have nothing to gain whether the Colorado River project goes through or not. I am not here this evening to try to put one set of tribal members against another set. It serves no purpose.

The requests that you have made in terms of insuring that adequate water is going to be available are reasonable. As Mrs. Stillman said

so eloquently today, Indians are not against progress by non-Indians, but they do not want it to be at the expense of Indians. This is not unreasonable. Indians are interested in progress, but not at the expense of Indians. I too want to see progress, but not at the expense of Indians, whether it be the Colorado project or any other project. And that is what I am going to work for in Congress. The subcommittee stands in recess.

(Thereupon, the hearing was concluded at 9:20 p.m.)

APPENDIX I

Informal Hearing With Traditional Hopi Leaders, Phoenix, Ariz.

(In the office of the Executive Airport, Phoenix, Arizona, at 9:15 a.m., the Subcommittee held an informal hearing with Hopi Religious leaders concerning use and protection of Hopi lands from the viewpoint of traditional tribal members. Senator Edward M. Kennedy, chairman of the Subcommittee, presided. Also present were Thomas M. Susman, assistant counsel, and Henry Herlong, minority counsel.

(The following statements were presented through an interpreter, Carlotta Shattuck. Accompanying the wintesses was Mr. John Ecohawk, an attorney with the Native American Rights Fund.)

Statement of Mina Lansa, Kikmongwi

I am Mina Lansa, Kikmongwi of the Hopi Village of Old Oraibi. I am one of four Kikmongwi, who together are the authority over *all* Hopi lands and life.

Like Mr. Nayatewa from First Mesa, I have been the subject of much bad treatment by Hopi Bureau of Indian Affairs Agency officials. They tell me over and over I have no authority. Instead, they chose to recognize someone else as Kikmongwi. The leadership of the Village is something for the village to decide, not the Bureau of Indian affairs. It is just convenient for the Bureau of Indian Affairs to recongize someone else who agrees with their policies, which is what they have allowed to happen.

Anyway, I hear you are interested in the Central Arizona Project because of its effect on Indian land and water. You should be interested in the situation of the Hopis then. Hopi Land was leased out by the Hopi Tribal Council for a coal mine. It is on Black Mesa (Tukunavi). The Tribal Council did not consult the Kikmongwi, the holders of the land, as they are supposed to do. We oppose this coal lease because it violates our Hopi beliefs. That is why we have brought a lawsuit to stop this lease. The suit, which is against the Secretary of Interior and the coal company, is pending in Washington, D.C., where it should be heard. The Secretary should not have approved the lease because the Tribal Council acted illegally in passing the lease.

Part of the coal from the Black Mesa mine goes to the Navajo Power plant which is being built. The Bureau of Reclamation will be getting almost 25% of the electricity produced for use on the Central Arizona Project. The electricity will work the pumps to get the water from the Colorado River to Phoenix.

The Interior Department through the Bureau of Indian Affairs is supposed to help us protect our lands, but in this case, they needed *our lands for their own* Central Arizona Project. This is a conflict of interest which they talk about.

The Interior Department says the Hopis got a good deal because they got money for the lease. We don't want the money—*we want our land.* Our land is now being torn up by strip mining and it threatens Hopi Life. This kind of thing leads us to destruction. Land, water is precious to our physical and spiritual life. We depend on our Mother Earth for our existence. The Government will not provide our physical and spiritual needs after you have taken all from us. We, the Hopi, were the first who step on this continent, it is Hopi Land. The land was given to us directly from the Supreme Power and it does not belong to the Government of the Navajo.

I appreciate your concern and interest and I earnestly hope you will begin to work towards resolving the many wrongs done us.

STATEMENT OF NED NAYATEWA, KIKMONGWI

My name is Ned Nayatewa, Kikmongwi of the Consolidated Villages, 1st Mesa, Polacca, Arizona. I am one of four Kikmongwi of the Hopi Villages. Together we have authority over all Hopi Lands. This is according to Hopi Traditional Government, which has existed from time immemorial.

Our Hopi traditions and religion are still very strong. They have had been handed down by word of mouth for centuries. In 1936 the Hopi adopted a constitution and by-laws. The provisions in the constitution recognized the independence of the villages and the owners of the Hopi Kikmongwi.

The Tribal Council which was created by the constitution has had many problems since its beginning. In fact, it even went out of existence for a while before it was restored and its getting bad again. Many of these problems are the results of a conflict with the principles of Hopi Traditional Government. There were many disputes concerning the powers of the Tribal Council as opposed to the powers of the Kikmongwi, and these problems seem to continue.

The Bureau of Indian Affairs, as trustee, has the responsibility of interpreting and enforcing the constitution as it was written and as it was intended to function. I think the Bureau of Indian Affairs has done this in order to implement their policy, many of which the Kikmongwi have opposed. This is the paternalism of the Bureau of Indian Affairs which we do not want. We want self-determination.

A good example of this is a recent dispute which has arisen over a lease of 1st Mesa Lands to a church. The lands involved are 1st Mesa lands over which I and other mongwituh (Hopi Authority) have jurisdiction, according to our Hopi Custom which is recognized by the Hopi Constitution.

Nevertheless, the Tribal Council leased the land on the church. I challenged this lease when I instituted an administrative appeal through the Bureau of Indian Affairs last Spring. The Bureau of Indian Affairs Acting Commissioner issued a suspension order in regards to the lease during the appeal, but it was ignored by the Phoenix Area Office.

I was forced to withdraw from the Appeal when I was pressured by the Hopi Agency Superintendent, Mr.Homer Gilliland. My Son had put in for a commercial lease, which was pending before the Tribal Council. Since it had not yet passed Mr. Guilliland's function to approve or disapprove the lease had not come into play. This was a matter of tribal politics and Mr. Gilliland had no business interjecting himself in the issue. He is supposed to stay out of intra-tribal disputes, but instead he was trying to force me to drop my challenge of his approval of the church lease.

He said that even though I was Kikmonqwi, I had no power under the constitution and the Hopi people didn't have any power, only the Tribal Council had power. He also told me that my Son will go to jail for five years if I did not drop the church lease appeal because my son accepted $25,000.00 for his business. He also said the old-pension money, the grant money for Hopi youth; and Housing would stop if I did not drop the church lease appeal or if I did not drop my attorney. However, I never said the church lease was valid that is why I am with the other Hopi Authority who have continued this appeal.

I understand that they are having a problem in continuing the appeal because the Bureau of Indian Affairs says that this is improper substitution of parties. I think they are using a technicality, so that they don't have to decide the issue—the legality of the lease.

Anyway because of this intimidation from the Bureau of Indian Affairs Superintendent, I was forced to drop my appeal. I was only trying to secure the powers and authority which are mine as a Kikmonqwi and which are recognized under the constitution. I think this shows the discrimination which the Bureau of Indian Affairs has practiced against the Hopi Kikmongwi.

EXHIBIT A

Plaintiffs' Memorandum of Points and Authorities, *Lomayaktewa* v. *Morton*, July 21, 1971, Concerning Secretary's Approval of Strip Mining Lease on Hopi Land

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

(Civil No. 974–71)

STARLIE LOMAYAKTEWA, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

This action was brought by 62 Hopi plaintiffs, including the principal religious leaders of the respective Hopi villages, to declare invalid and set aside the Secretary of the Interior's approval of a strip mining lease between the Hopi Tribal Council and the Sentry Royalty Company.

Strip mining operations are now being conducted by the defendant Peabody Coal Company on Black Mesa. To the plaintiffs, this situation is intolerable. The strip mining of sacred Hopi lands violates the highest and most sacred of all Hopi religious principles: care for the Earth as one would care for his Mother.

This motion for summary judgment was brought because of the intolerable situation confronting the plaintiffs and because it appears that the determination of the basic issue involved in this case, the Secretary's authority to approve a lease entered into by the Hopi Tribal Council, does not involve any material issues of fact and is therefore ripe for treatment by motion for summary judgment.

ARGUMENT

I. The Hopi constitution and by-laws do not authorize the Hopi Tribal Council to lease tribal lands

As shown by Exhibits A, B, C, and D attached to the Affidavit of Robert S. Pelcyger, the Secretary of the Interior has concluded, following a detailed analysis, that the Hopi Constitution and By-Laws do *not* authorize the Hopi Tribal Council to lease lands.

The Secretary's conclusion is obviously correct for the reasons set forth in the memorandum of the Assistant Solicitor for Indian Legal Activities, Exhibit D to the Affidavit of Robert S. Pelcyger. Two provisions of the Hopi Constitution not cited by the Assistant Solicitor lend further support to his conclusion that power to lease was withheld from the powers delegated by the Tribe to the Hopi Tribal Council.

The Black Mesa lands which are leased for strip mining purposes are so-called "unoccupied land beyond the clan and village holdings." (Article VII, Section 1 of the Hopi Constitution, Exhibit B attached to the Complaint, p. 9.) Pursuant to Article VII, Section 1 of the Hopi Constitution, these "unoccupied" lands "shall be open to the use of any number of the Tribe, under the supervision of the Tribal Council." There is nothing said of leasing or otherwise disposing of these lands. The duties of the Tribal Council with respect to these lands are clearly and specifically set forth: to supervise the assignment of the use of these lands to members of the Hopi Tribe. Section 2 of Article VII laso grants the Tribal Council supervisory power over range lands, but only for the purposes of "improving and preserving the range." Entering into a strip mining lease is not only not authorized by this section: it is directly contrary to the Tribal Council's obligation to improve and preserve the range.

Any argument to the effect that the power to lease tribal lands can be implied from other provisions of the Hopi Constitution is explicitly negated by Article VI, Section 4 (Exhibit B attached to the Complaint, p. 9). That section provides in its tienrety:

"Any rights and powers which the Hopi Tribe of Indians now has, but which are not expressly mentioned in this Constitution, shall not be lost or limited by this article, but may be exercised by the members of the Hopi Tribe of Indians through the adoption of appropriate by-laws and constitutional amendments."

The Hopi Constitution thus insists on a crucial distinction between the Hopi Tribe of Indians, which consists of all the members of the Hopi Tribe, and the Hopi Tribal Council. The powers not delegated to the Hopi Tribal Council are retained by the Hopi Tribe. The Solicitor's Opinions attached to this Memorandum as Exhibits E and F show that the usual and ordinary assumption is that the powers not delegated to a specific organ of a tribe are retained by the tribe itself unless the tribal constitution or other organizational document indicates an intention to delegate all tribal powers to a tribal council. Certainly, Article VI, Section 4 of the Hopi Tribal Constitution requires an amdndment to the Constitution before the powers of the Hopi Tribal Council can be expanded beyond those conferred by the Constitution.

In his letter purporting to delegate leasing authority to the Hopi Tribal Council, Exhibit A to the Affidvait of Robert S. Pelcyger, the Assistant Secretary of the Interior ironically "suggest(s) that the tribe consider amending its constitution in the manner provided by Article X, to specifically authorize the Hopi Tribal Council to lease tribal lands." Nothing has come of this suggestion.

II. The Secretary of the Interior exceeded his authority by purporting to delegate leasing authority to the Hopi Tribal Council

Since the Secretary of the Interior has acknowledged that the Hopi Constitution and By-laws do not authorize the leasing of tribal lands by the Hopi Tribal Council, the motion for summary judgment turns on the validity of the Secretary's purported delegation of leasing authority to the Hopi Tribal Council pursuant to Article VI, Section 3 of the Hopi Constitution. The purported Secretarial delegation or grant is contained in the correspondence attached to the Affidavit of Robert S. Pelcyger as Exhibits A, B, and C.

Article VI, Section 3 of the Hopi Constitution provides:

"The Hopi Tribal Council may exercise such further powers as may in the future be delegated to it by the members of the Tribe or by the Secretary of the Interior or any other duly authorized official or agency of the State or Federal Government."

In purporting to delegate leasing authority to the Hopi Tribal Council notwithstanding his conclusion that such authority was withheld by the Hopi Constitution and By-laws, the Secretary of the Interior evidently construed Article VI, Section 3 as blanket authority to delegate any and all powers to the Hopi Tribal Council without limitation or restriction. Stating the proposition is its own best refutation. Such a construction of one section of the Constitution would have the effect of making the remaining very carefully drafted provisions essentially meaningless. What would be the purpose of so carefully defining and limiting the powers of the Tribal Council and of reaffirming the autonomy of the self-governing villages, if those powers could be vastly expanded, and the autonomy of the villages correspondingly destroyed, at the whim of whoever happened to be the Secretary of the Interior?

The Constitution, taken as a whole, negates any such conclusion. If there is one thread tying the various provisions of the Constitution together, it is the idea expressed in the Preamble "of preserving the good things of Hopi life." The "good things of Hopi life" include the traditional forms of government and of authority that have been an essential part of Hopi culture for centuries. The constitutional provisions defining the composition and powers of the Tribal Council were designed to insure the least possible interference with the Hopi traditional forms of government while at the same time providing "a way of organizing to deal with modern problems." (Preamble). As stated by the Solicitor of the Department of the Interior in a memorandum written one year after the adoption of the Hopi Constitution, "The enumerated powers of the Tribal Council were to be as close to the legal minimum as possible." (Exhibit C attached to the Complaint.)

Now comes the Secretary of the Interior claiming the authority to alter this delicate balance on his own, without even submitting the question to the members of the Hopi Tribe who created the entity known as the Hopi Tribal Council.

Article VI, Section 3, cannot be construed to permit the Secretary to delegate powers that the Tribe has withheld from the Tribal Council. Further, and even more obviously, Section 3 cannot possibly authorize the Secretary to delegate powers which he himself does not have authority to exercise. To delegate means to transfer from one to another. Implied in the very notion of a delegation is the idea that the one who delegates has the power and authority to do that which he delegates or transfers to others.

The Secretary of the Interior does have authority to approve or disapprove leases of tribal lands. See 25 U.S.C. §§ 415, 396a and 635. However, it is clear beyond any doubt that this power to approve or disapprove does *not* authorize or empower the Secretary to dispose of tribal lands or interests in tribal lands on his own. *Tooahnippah* v. *Hickel* 397 U.S. 598 (1970), *Mott* v. *United States* 283 U.S. 747 (1931), *United States* v. *West* 232 F. 2d 694 (9th Cir. 1956). See also *Lane* v. *Pueblo of Santa Rosa* 249 U.S. 110 (1919), *Cramer* v. *United States* 261 U.S. 219 at 234 (1923), and 18 Ops. Atty. Gen. 234 (1885). If the Secretary does not have the power to lease tribal lands, he cannot, in logic or in law, delegate that power to another entity.

Where then does the Secretary get authority to delegate to the Hopi Tribal Council powers he himself does not have? Not from the laws of the United States. The only authority claimed for usurping the right reserved under the Hopi Constitution to the Hopi Tribe of Indians is Article VI, Section 3.

This section authorizes the Hopi Tribal Council to exercise such further powers as may be delegated in the future by members of the Tribe, or by the Secretary of the Interior, or any other *duly authorized* Federal or State official or agency. The words "duly authorized" apply to the Secretary as well as to other Federal or State officials. In order to be "duly authorized," the Secretarial delegation must be made pursuant to some law empowering the Secretary to act in a manner specified by the law.

There are many examples of the kinds of "duly authorized" delegations contemplated by Section 3. 25 U.SC. § 48 authorizes the Secretary to delegate to "the proper authority of the tribe" responsibility for directing the employment of persons such as blacksmiths and farmers who have been "engaged for them." Various other federal enactments give the Secretary authority to operate and maintain irrigation systems (25 U.S.C. § 13), to construct and maintain roads and trails (25 U.S.C. §§ 318a and 631), to construct and operate schools for, and provide for the education of, Indians (25 U.S.C. §§ 13, 271 *et seq.*, 452 *et seq*), to convey federally owned buildings to Indian tribes (25 U.S.C. § 443a), and so on almost endlessly. Article VI, Section 3 of the Hopi Constitution empowers the Hopi Tribal Council to accept delegations of these and similar Secretarial responsibilities and obligations* as well as delegations from other "duly authorized" federal or state officials. It does not, and cannot, authorize the Secretary to delegate powers he does not otherwise possess.

There are, then, at least two crucial limitations on the powers that can be delegated under Section 3. First, the official or agency that does the delegating must be "duly authorized," that is, he or it must be acting within the scope of his statutory authority. Second, the power delegated must not be one that was withheld from the Hopi Tribal Council by the Hopi Tribe in the Hopi Constitution and By-laws. Any construction of Section 3 that is not subject to these limitations would purport to empower federal or state officials to act beyond their statutory authority or would make a mockery of the delicate balance of power woven into the fabric of the Hopi Constitution and By-laws. On both counts, the Secretary's purported delegation of leasing authority must fail.

Under the Hopi Constitution, the Hopi Tribe retained the right to expand the powers of the Hopi Tribal Council beyond those specified in the Hopi Constitution. See Article VI, Section 4 and discussion in Part I, *supra*. In entering into the Black Mesa strip mining lease based on the mistaken authority of the Secretary's purported delegation, the Hopi Tribal Council did not follow the procedures required by law.

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*Plaintiffs do not take a position on whether the Secretary's duties pursuant to the statutes cited in this paragraph can properly be delegated to tribal officials. The statutes are cited only for the purpose of indicating the kinds of responsibilities within the ambit of Article VI, Section 3.

In comparable circumstances, during the term just completed the Supreme Court invalidated an ordinance of the Blackfeet Indian Tribe because the ordinance was adopted by the Tribal Council rather than by vote of the Tribe as a whole as required by law. *Kennerly v. District Court of Ninth Jud. Dist. of Montana* 400 U.S. 423, 27 L. Ed. 2d 507, 91 S. Ct. 480 (1971). See also, *Pueblo of Santa Rosa v. Fall* 273 U.S. 316 (1927). The Secretary of the Interior does not have authority to approve tribal enactments which fall short of legal and procedural requirements. *Mott v. United States, supra; Pueblo of Santa Rosa v. Fall, supra;* 18 Ops. Atty. Gen. 497 (1886).

The Secretarial delegation of leasing authority is invalid. Without that purported delegation, it is admitted by the Secretary that the Hopi Tribal Council does not have leasing authority. Because the Secretary's approval of the Black Mesa strip mining lease was predicated on his earlier unauthorized delegation, and because the Hopi Tribal Council did not follow the procedures required by the Hopi Constitution, the Secretary's approval of the Black Mesa strip mining lease is invalid and must be set aside.

The Secretary's approval of the Black Mesa strip mining lease is subject to judicial review and summary judgment is appropriate

The Secretary of the Interior's approval of the Black Mesa strip mining lease is subject to judicial review under the Administrative Procedure Act. *Tooahnippah v. Hickel* 397 U.S. 598 (1970); *Scanwell Laboratories, Inc. v. Shaffer* 424 F. 2d 859 (D.C. Cir. 1970); *Environmental Defense Fund v. Ruckelshaus* 439 F. 2d 584 (D.C. Cir. 1971).

The only exceptions to judicial review under the Administrative Procedure Act are where there is a statutory prohibition on review or where "agency action is committed by law to agency discretion by law." 5 U.S.C. § 701, *Citizens to Preserve Overton Park v. Volpe* 401 U.S. 402, 28 L. Ed. 2d 136 (1971). Here, there is certainly no showing of clear and convincing evidence of a legislative intent to restrict access to judicial review.

The exception for action committed to agency discretion is also not applicable. The exception is "very narrow." It is applicable only in those rare instances where "there is no law to apply." *Citizens to Preserve Overton Park v. Volpe, supra.* Here, manifestly, there is "law to apply." *Tooahnippah v. Hickel, supra.* One of the most obvious sources of applicable law is the provisions of the Hopi Constitution and By-laws which are binding on the Secretary of the Interior. *Healing v. Jones* 210 F. Supp. 125 at 162,164,166 and 187 (D. Ariz. 1962), aff'd 373 U.S. 758.

There is no genuine issue of material fact. The record speaks for itself. The Secretary of the Interior's approval of the Black Mesa strip mining lease was predicated upon his earlier purported delegation of leasing authority to the Hopi Tribal Council. The validity of that purported delegation presents a simple and straightforward question of law. If the attempted delegation fails, the Secretary's approval of the Black Mesa strip mining lease must be set aside, since no vested rights are created by actions of government officials that are outside the bounds of their authority and in violation of pertinent regulations and laws. *Gray v. Johnson* 395 F. 2d 533 (10th Cir. 1968) *cert. denied* 392 U.S. 906. A disposition pursuant to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate. *First Natl. Bank of Ariz. v. Cities Service* 391U.S. 253, 288–289 (1968); *United States v. Gossett* 416 F. 2d 565 (9th Cir. 1969), *cert. denied* 397 U.S. 961.

CONCLUSION

The only conclusion that can be drawn from the documentary record and from an analysis of the applicable law is that the Secretary of the Interior's purported delegation of leasing authority to the Hopi Tribal Council involved a clear error of law. The Secretary's approval of the Black Mesa strip mining lease must therefore be declared unlawful and set aside.

Dated at Escondido, California, July 21, 1971.

Respectfully submitted.

EXHIBIT B

Statement of Hopi Religious Leaders on Black Mesa Strip Mine

Hopi land is held in trust in a spiritual way for the Great Spirit, Massau'u. Sacred Hopi ruins are planted all over the Four Corners area, including Black Mesa. This land is like the sacred inner chamber of a church—our Jerusalem.

The area we call "Tukunavi" (which includes Black Mesa) is part of the heart of our Mother Earth. Within this heart, the Hopi has left his seal by leaving religious items and clan markings and plantings and ancient burial grounds as his landmarks and shrines and as his directions to others that the land is his. The ruins are the Hopi's landmark. Only the Hopi will know what is here for him to identify—others will not know.

This land was granted to the Hopi by a power greater than man can explain. Title is invested in the whole makeup of Hopi life. Everything is dependent on it. The land is sacred and if the land is abused, the sacredness of Hopi life will disappear and all other life as well.

The Great Spirit has told the Hopi Leaders that the great wealth and resources beneath the lands at Black Mesa must not be disturbed or taken out until after purification when mankind will know how to live in harmony among themselves and with nature. The Hopi were given special guidance in caring for our sacred lands so as not to disrupt the fragile harmony that holds things together.

Hopi clans have traveled all over the Black Mesa area leaving our sacred shrines, ruins, burial grounds and prayer feathers behind. Today, our sacred ceremonies, during which we pray for such things as rain, good crops, and a long and good life, depend on spiritual contact with these forces left behind on Black Mesa. Our prayers, songs, ceremonies and rituals draw their strength and vitality from the spiritual forces left by our ancestors. Each year, after our ceremonies in the Kiva of each village, Hopi messengers carry our sacred prayer feathers and cornmeal and plant them at these spiritual places and shrines. This is our contact with the spirit, people who are our ancestors who lived and traveled in these areas. The purpose is to bring rain so that our crops will grow. If these places are disturbed or destroyed, our prayers and ceremonies will lose their force and a great calamity will befall not only the Hopi, but all of mankind.

Hopis are the caretakers for all the world, for all mankind. Hopi lands extend all over the continents, from sea to sea. But the lands at the sacred center are the key to life. By caring for these lands in the Hopi way, in accordance with instructions from the Great Spirit, we keep the rest of the world in balance.

To us, it is unthinkable to give up control over our sacred lands to non-Hopis. We have no way to express exchange of sacred lands for money. It is alien to our ways. The Hopis never gave authority and never will give authority to anyone to dispose of our lands and heritage and religion for any price. We received these lands from the Great Spirit and we must hold them for him, as a steward, a caretaker, until he returns.

Eagle shrines are located throughout the Black Mesa area. The prayer feathers that are so essential to our religious life and all our ceremonies must be Eagle-feathers. Without them, we cannot place and carry our sacred messages to the spiritual world, we cannot hold the land for the Great Spirit. If the eagles are forced to flee the heart of our Mother Earth because of man's activity, it will no longer be possible for us to live in our spiritual and religious way. The life of all people as well as animal and plant life depend on the Hopi spiritual prayers and song. The world will end in doom.

Water under the ground has much to do with rain clouds. Everything depends upon the proper balance being maintained. The water under the ground acts like a magnet attracting rain from the clouds; and the rain in the clouds also acts as a magnet raising the water table under the ground to the roots of our crops and plants. Drawing huge amounts of water from beneath Black Mesa in connection with the strip-mining will destroy the harmony, throw everything we have strived to maintain out of kilter. Should this happen, our lands will shake like the Hopi rattle; land will sink, land will dry up. Rains will be barred by unseen forces because we Hopis have failed to protect the land given us, as we were instructed. Plants will not grow; our corn will not yield and animals will die. When the corn will not grow, we will die; not only Hopis, but all will disintegrate to nothing.

We, the Hopi religious leaders, have watched as the white man has destroyed his lands, his water and his air. The white man has made it harder and harder for us to maintain our traditional ways and religious life. Now—for the first time—we have decided to intervene actively in the white man's courts to prevent the final devastation. We should not have had to go this far. Our words have not been heeded. This might be the last chance. We can no longer watch as our sacred lands are wrest from our control, as our spiritual center disintegrates. We cannot allow our control over our spiritual homelands to be taken from us. The hour is already very late.

STARLIE LOMAYAKTEWA,
Kikmongwi of Mishongnovi.
NED NAYATEWA,
Kikmongwi of First Mesa.
JACK PONGAYESVIA,
DAVID MONOGIE,
Religious Leader of Hotevillia.
MINA LANSA,
Oraibi, Kyakotsmovi and Lower Moenkopi.
CLAUDE KEWANYAMA,
Kikmongwi of Shungopari and Sipaulovi.
THOMAS BANYACYA, SR.,
Official Interpreter, Village of Kyakotsmovi.
CARLOTTA SHATTUCK,
Recorder, Village of Walpi.

EXHIBIT C

STATEMENT CONCERNING DEVELOPMENT OF SAN FRANCISCO PEAKS

HOPI INDEPENDENT NATION,
Oraibi, Ariz.

To: The Honorable Richard M. Nixon, the White House, Washington, D.C.; Mr. Rogers C.B. Morton, Secretary of the Interior, Department of the Interior, Washington, D.C.; U.S. Forest Service, U.S. Department of Agriculture, Attention: Forest Supervisor, 114 No. San Francisco, Flagstaff, Ariz.; and The Coconino Board of Supervisors, County Court House, Flagstaff Ariz.

From: Mr. Herbert Talahaftewa, Villiage of Shongopavi, Second Mesa, Arizona.

Via: The Honorable Claude Kewanyama, Kikmongwi of Shongopavi, Second Mesa, Arizona.

Re: San Francisco Peaks, Flagstaff, Ariz.

1. I have twice attended hearings regarding the developing of the San Francisco Peaks, the Hopis' Holy Mountain. Each time we have listened and we have opposed to *ANY* development of the Mountain. It is strongly evident that there is no voice that could be spoken strong enough to convince the non-Indian public to heed our warnings regarding the developing of the Holy Mountain.

2. Upon returning home, I have had many thoughts and have sadly realized that you have already claimed that Mountain for yourselves. The names you have given to all the areas on the Mountain, as if it were yours. You talked of acreage, you talked how your children will enjoy the recreation you will make for them, you talked of mining claims by your people, you talked of watershed works, you talked of artificial snow; then you invited *your public* to come and talk about how their San Francisco Peaks can be developed. Not once have the Hopi Authority been invited formally or officially. Not once have you mentioned and talked of the most vital issue of all—and that is the rain, moisture, clouds, including all living life and everything that relates to this whole Mountain on those basis, which will sustain life for us all as it has in the past, present and will continue—if you leave it alone.

3. I have been told that the Whiteman has holy land areas too. You have even written your holy places, you wrote a book describing life at its beginning and the end and I am told some have been fulfilled and some have not. Also, in your holy book, you have commandments instructing giving you guidelines to follow. We Hopis too, have a holy land; holy instructions, holy mountains unblemished and we were instructed to keep them unblemished. Because perhaps the San Francisco Peaks is not your holy mountain, you chose to do with it whatever you see fit—as

if your are God yourself, designing you plans, zoning areas where things will be, turning the acreages to money and then seeking buyers. Our holy lands are land embodied in a sacred relationship between us and the universe; holy lands cannot be defiled, desecrated or cheapened or sold or divided or cut into fragments and then deciding which is sacred and which is not. So long as life exists, so long as the sun rises and sets, the Holy Mountain remains holy. Inasmuch, you have claimed the Mountain for yourselves, it is still the Hopis Holy Mountain.

4. I cannot stress enough, Nu-vah-tuh-kah-Ovie (San Francisco Peaks) is sacred and holy. The whole mountain tells of many spiritual things that you will not understand even if we told you. Each Hopi Village was planned around the Holy Mountain. Therefore, Tu-tu's-kah (shrines or altars) are on the Mountain to signify its holiness. Other shrines in other areas link to the shrines on the holy Mountain. You query as to the location of these shrines and seeking just how sacred and holy the Mountain is, demanding us to prove the Mountain's holiness—that my friend, is the Supreme One's duty to show you one day and it just may be too late for you to do anything about. To show you the shrines will just be another "give-away" to your curiosity to add to your wealth and before I realize it, you will be charging $2.00 per individual to have curiosity seekers gawking into what is sacred to us. We (Hopi) have learned from watching you just exactly what you can and will do. One of the glaring examples is that you have turned our landmarks (called Pueblo ruins) into money-making sources of income for yourselves. Again and again we stand helpless because the Whiteman stands holding justice in one hand and injustice in the other hand. The Whiteman makes mountains of laws for himself and says, "it's the law" thus, taking our lands and justifying it with the laws he established. He never has to prove anything he has taken. However, he demands the Indian to prove what is his, simultaneously stipulating that the Indian has to use the laws the Whiteman established to protect himself (of which the Indian had no part.)

Then, when the Indian begins to use that Whiteman Law and is on the brink of winning the issue because he justified his (Indian) point in the name of justice, the Whiteman immediately changes the law again to benefit himself. Time after time, this is how the Indian is losing his land, water, natural resources—all through an illegal process of injustice. They have even set up a pseudo justice department in the Department of Interior through which the Indian has always lost. The Hopi was instructed not to yield to this type of government; hence, the Hopi Authority have resisted the Bureau of Indian Affairs Department of Interior and also the BIA-instituted Tribal Council, which is nothing more than a puppet for the U.S. Government *via* the Bureau of Indian Affairs, to eventually wrest our lands, water and natural resources from us in the name of so-called economic development, jobs, new acts, etc. So long as there are Hopis who heed the Instructions of the Supreme Power, he will never yield. One day, that Hopi generation will become professionally capable and the time will be when we (Hopis) and your government will sit together face to face to negotiate and determine whose land this is. In the meantime, the Hopi Authority is holding fast to the Supreme One's Instructions to the Hopi which are vested in them and maintained by them, unchanged. Their allegiance and loyalty is first to the Supreme One, Father and Creator of all living things. (To us all three names identify the same.)

5. Finally, the last said, but the foremost words spoken is my Kikmongwi, speaks now.

HERBERT TALAHAFTEWA.

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6. From time immemorial the Hopi have lived in this vast territory and our Hopi People have boundaried this territory by the Instruction of the Supreme Power. This boundary was established by building its towns, cities (you prefer to call them villages or pueblos), and then moving on to establish another and each one linking to mark the Hopi boundaried territory. These "pueblos" were built from native materials which will not deteriorate or will withstand time. It is instructed, "This will be your title to the land I have given you—no man can disprove this. However, there will be one who will try to wrest this out of your control and you must resist." There are other numerous things in the Great Instructions which will be irrelevant for the purpose of this letter, for now. The man I sent to the hearings, Herbert Talahaftewa, has returned to inform me that you talked as if the Nu-vah-tu-kah-Ovie is yours. Therefore I must ask now:

(*a*) When did the Hopi Kikmongwi sit in conference with any President since the coming of the Whiteman?

(*b*) When did the Hopi Kikmongwi relinquish his title and right to the boundaried Hopi land?

(*c*) When did the Hopi Kikmongwi relinquish or surrender the Holy Mountain to the United States Government? Or any other government? If so:

(1) When was it?
(2) Where?
(3) Who negotiated?

D. When was the Hopi boundaried land, given by the Supreme Power to the Hopi, ceded to the United States Government? Or any other governments? If so:

(1) When?
(2) Where?
(3) Who negotiated?

I want answers, legal documents that have been dealt with the Hopi Kikmongwi, not the BIA-instituted Tribal Council I do not want any document relating to the Healing v. Jones case. Nor do I want my letter referred to the BIA to receive the same kind of answers I have been receiving. I repeat, I want my questions answered by each of you as addressed. I do not honor unauthorized tribal attorneys determining for me what the Hopi boundaried territory is; nor do I honor illegal tribal councils determining for me what is Hopi boundaried land.

I will await your word by letter from each of you.

Sincerely yours,

CLAUDE KEWANYAMA.

EXHIBIT D

CORRESPONDENCE CONCERNING OPPOSITION TO LEASING OF CERTAIN HOPI LANDS

NATIVE AMERICAN RIGHTS FUND,
Berkeley, Calif., April 26, 1971.

Mr. HOMER M. GILLILAND,
Superintendent, Hopi Agency,
Bureau of Indian Affairs,
Keams Canyon, Ariz.

DEAR MR. GILLILAND: By letter dated April 8, 1971 from the Acting Associate Commissioner of Indian Affairs, our client, Ned Nayatewa Kikmongwi of First Mesa, was informed that on March 17, 1971 you approved a long term lease, allegedly authorized by the Hopi Tribal Council, of Tewa land at First Mesa to the Church of Jesus Christ of Latter-day Saints.

Pursuant to 25 C.F.R. § 2, Mr. Nayatewa hereby appeals your decision approving this lease to the Phoenix Area Director of the Bureau of Indian Affairs.

This appeal is based upon the following reasons:

(1) The Hopi Tribal Council does not have power, authority or jurisdiction to lease the lands in question since the lands are within the traditional clan holdings of the village of First Mesa. Pursuant to Artcile VII, Section 1 of the Hopi Constitution all authority over these lands is reserved to the village of First Mesa and decisions with regard to these lands are to be made according to the established customs of the village. The Hopi Tribal Council has no right or authority to interject itself in village affairs or to deal, directly or indirectly, with any clan leaders asserting jurisdiction over the lands. See also Article III, Section 2(d) of the Hopi Constitution.

(2) The Hopi Tribal Council does not have power to lease lands belonging to the Hopi people. Pursuant to Section 1(c) of Article VI of the Hopi Constitution, the Tribal Council has the authority to *prevent* the lease of tribal lands, dispose of these lands. See also Article VII, Section 1 of the Constitution.

(3) The lands in question are not tribal lands. They are village lands.

(4) The land which is to be leased to the Church of Jesus Christ of Latter-day Saints does not belong to and is not owned by the Sand Clan of First Mesa. The leaders of the Sand Clan of First Mesa do not have power or authority to grant or assign Hopi land or First Mesa land to anyone without the authority or consent of the Kikmongwi of First Mesa.

(5) The Hopi Tribal Council that approved the lease of the lands in question is improperly constituted. Most of the people who purported to act as members of the Tribal Council were not certified in accordance with the procedures specified

in and mandated by the Hopi Constitution. See Article IV, Section 4 and Article III, Sections 3 and 4. Therefore, there was no quorum (within the meaning of Article IV, Section 6 of the Hopi Constitution) at the February 1, 1971 purported meeting of the Hopi Tribal Council at which the lease in question was approved The business allegedly transacted at the February 1, 1971 meeting of the Hop Tribal Council is null and void and of absolutely no force and effect.

(6) 25 U.S.C. § 635 does not provide any authority for the Tribal Council's purported action. It does not even mention the Hopi Tribal Council. (Contrast § 635(a) which applies to both the Navajo's and Hopis with §§ 635(b) and 635(c) which applies only to the Navajos and which delegates authority directly to the Navajo Tribal Council.) Section 635(a) provides only that restricted Indian lands "owned by the Hopi Tribe, members thereof, or associations of such members, may be leased" for certain purposes "by the Indian owners, with the approval of the Secretary of the Interior." The law in no way expands the jurisdiction or authority of the Hopi Tribal Council with respect to the lands in question because the Tribal Council is not the "owner" of the lands. The language of the statute makes it perfectly clear that it was *not* designed either to alter pre-existing ownership patterns or to delegate authority to one person or entity in preference to any other.

Pursuant to 25 C.F.R. § 2.10, we respectfully request that you supply us with the following information:

(1) A copy of the minutes of the meeting of the Tribal Council at which the lease in question was approved;

(2) A list of the alleged members of the Hopi Tribal Council at the time the purported lease was approved and the villages such members allegedly represent;

(3) A copy of the minutes of all of the meetings of the Hopi Tribal Council at which all of the alleged current members of the Hopi Tribal Council were seated and/or certified in accordance with Article IV, Section 4 of the Hopi Constitution;

(4) Copies of any written certifications by the Kikmongwi or other *authorized* village officials of the tribal council representatives from their respective villages (Article IV, Section 4 of the Hopi Constitution);

(5) Copies of any written communications between alleged members of officers of the Hopi Tribal Council and members or leaders of the Sand Clan of First Mesa;

(6) A copy of the lease;

(7) Any information in the files of the Bureau of Indian Affairs concerning the status and/or ownership of the lands in question;

(8) Any information concerning the requirements for a quorum of the Hopi Tribal Council, including a determination, based upon all available Bureau records, of the minimum number of members of the Hopi Tribal Council that have "transacted business" at any Tribal Council meeting; and

(9) Any other material or information relied on by the Superintendent in approving the lease in question including any legal opinions, memoranda or analyses of the provisions of the Hopi Constitution cited in this letter.

Pending determination of this appeal, we request that the approval of the lease to the Church of Jesus Christ of Latter-day Saints be suspended in order that the status quo be maintained and irreparable injury prevented. Please let us know whether the approval will be suspended as soon as possible so that we will have an opportunity to seek other available redress if our request for suspension is denied.

If you will provide us with the names and addresses of other persons interested in this appeal, we will serve notice of this appeal upon them pursuant to 25 C.F.R. §§ 2.11 and 2.33.

Sincerely yours,

ROBERT S. PELCYGER.

Copies of this petition served by *registered* mail ths 26th day of April 1971 to:

Mr. Clarence Hamilton, Chairman, Hopi Tribal Council, Tribal Council Hall, New Oraibi, Ariz.

Mr. John Boyden, Sr., Attorney for the Hopi Tribal Council, 315 East Second, South, Salt Lake City, Utah.

Signed:_____.

Sent copies to Church of Jesus Christ, of the Latter Day Saints, Salt Lake City and Indian Mission in Holbrook.

NATIVE AMERICAN RIGHTS FUND,
Berkeley, Calif., June 22, 1971.

Mr. GEORGE W. HEDDEN,
Assistant Area Director, Phoenix Area Office, Bureau of Indian Affairs, Phoenix, Ariz.

DEAR MR. HEDDEN: By letter dated June 3, 1971, the Phoenix Area Office of the Bureau of Indian Affairs denied Mr. Ned Nayatewa's appeal of the Hopi Superintendent's decision approving a lease of First Mesa (Tewa) and to the Church of Jesus Christ of the Latter Day Saints. Pursuant to 25 C.F.R. § 2, Mr. Nayatewa hereby appeals the decision of the Phoenix Area Office to the Commissioner of Indian Affairs.

The questions presented in this appeal are complex, both legally and factually. They involve such matters as the relationship of the Tewas and their band to the Hopis in general and to the First Mesa Kikmongwi in particular, the relationship between the clans and the village Kikmongwi, and the propriety of the manner in which many of the delegates to the Tribal Council were seated.

We suggest that a hearing held under the Commissioner's auspices would be the fairest and most expeditious manner of presenting the information essential to resolving these matters. The record of the proceedings would provide the Commissioner with the information he needs to resolve the conflicting claims of the Hopi Tribal Council and Mr. Nayatewa.

We would like to know how this appeal will be processed, and particularly whether a hearing examiner will be appointed, as soon as practicable. In the event that a hearing examiner is not appointed, we reserve the right to present further factual information and legal arguments to the Commissioner. However, our comments at this time will be limited to several aspects of the decision at the Phoenix Area Office which merit particular consideration.

The overriding theme of the decision of the Area Office is that the matters raised in the appeal are "internal tribal matters to be determined by officials of the Tribe and its constitutent bodies and not by this Bureau." What this high-sounding policy means in practice is that the Hopi Indian Agency and the Phoenix Area Office bow to the whims of the Hopi Tribal Council and permit it to run rampant in complete disregard of the strict limitations of the powers of the Tribal Council and of the broad powers of the self-governing villages and their Kikmongwis under the Hopi Constitution and By-laws. To say that the matters must be resolved "by the Tribe" begs the vital questions. What matters can properly be resolved by the Tribal Council? What powers are reserved to the self-governing villages? The Bureau cannot so easily escape its responsibilities.

Under the Hopi Constitution, the Bureau has obligations and responsibilities to the village Kikmongwis. By rubber stamping all of the actions of the Tribal Council and by permitting the Tribal Council to define its own powers and to determine its own composition, the Bureau is violating the letter and spirit of the Hopi Constitution.

By approving and recognizing the Hopi Constitution, the Department of the Interior became bound by, and obligated to enforce, its terms. See *Healing* v. *Jones*, 210 F. Supp. 125 at 162, 164, 166, and 187 (D. Ariz 1962), aff'd 373 U.S. 758. The policy of the Phoenix Area Office, as reflected in its denial of Mr. Nayatewa's appeal, would render numerous Departmental actions inexplicable and void. See the December 14, 1937 memorandum opinion of the Solicitor, attachment 1 to this appeal.

With respect to the authority of the Tribal Council to lease the lands in question, we note, first of all, that the status of the lands is an appropriate subject for the taking of evidence by the hearing examiner. Second, the Tewas, Tewa land and Tewa clans occupy a unique position in Hopi tradition and law owing to the peculiar historical relationship between the Tewas and the village of First Mesa. The relationship between the Tewas and the First Mesa Kikmongwi is not the same as exists in other Hopi villages. This, too, is an appropriate subject of inquiry for the hearing.

Third, the Solicitor of the Department of the Interior has recognized and held that the Hopi Tribal Council does not have authority to lease village lands. See the Solicitor's legal opinion, attachment to this letter. The Solicitor's opinion recognizes that the appropriate procedure for leasing village lands is for the village itself to enter into a lease. The decision of the Phoeniz Area Office does not veen mention or refer to this very important legal analysis of the relationship between the self-governing villages and the Hopi Tribal Council under the Hopi Constitution. The Solicitor has determined that the Hopi Council is not what is meant

by the term, "appropriate officials" in 25 CFR § 331.3 when village lands are involved.

Fourth, the Secretary of the Interior cannot delegate, confer or otherwise grant to the Hopi Tribal Council the power to lease. Under the Hopi Constitution, the power to lease was specifically withheld from the Council, as the Solicitor has determined. Article VI, Section 3 of the Constitution authorizes the Secretary to delegate powers that the Secretary himself is authorized to exercise. For example, the Secretary might delegate to the Council authority to run a school, or an irrigation project, or to maintain or construct roads, or to exercies other BIA responsibilities. But the Secretary cannot delegate powers he himself does not possess and which were specifically withheld from the Tribal Council. The Secretary's alleged delegation usurps the power reserved to the members of the Hopi Tribe under Article VI, Sec. 4 of the Hopi Constitution.

Fifth, the Act of May 22, 1970, 25 U.S.C. § 642(g), was not intended to authorize the Tribal Council to lease the village lands involved in this appeal. This is made abundantly clear by the Act's legislative history. This question will be briefed at an appropriate stage in the appeal process.

With regard to the composition of the Tribal Council at the time the lease was approved, we note several irregularities apparent on the face of the minutes of the Tribal Council's meeting of December 1 and 2, 1970. According to these minutes, the *former* "Governor" of Kyakotsmovi certified two representatives and "Governor" of Bacabi re-appointed and certified a representative. The villages of Bacabi and Kyakotsmovi have not adopted a written constitution. Therefore, they must be considered as being under the traditional Hopi organization, and the Kikmongwi of these villages must be recognized as their leaders. Article III, Sections 3 and 4 of the Hopi Constitution. The Governor, whoever he may be and however he may be selected, is not the Kikmongwi and is not the traditional leader of the village. He has no authority to certify anyone to the Tribal Council. Certainly, a *former* Governor has no such power. The very fact that a former Governor could be allowed to certify a representative to the Tribal Council is indicative of just how far the Phoenix Area Office and the Office of the Hopi Superintendent have gone in ignoring the provisions of the Hopi Constitution.

In addition to the improper certification of representatives from the villages of Bacabi and Kyakotsmovi, Mr. Nayatewa contends that the delegates from the villages of Sipaulavi and Oraibi were not properly certified by the Kikmongwis of their respective villages. This matter is also an appropriate subject for evidence before the hearing examiner.

A quorum of the Hopi Tribal Council consists of a majority of the members. Article IV, Section 6 of the Hopi Constitution. The membership of the Council is composed of the total number of seats allocated under the Constitution to the officers and the representatives from all the Hopi villages. Vacant sears are included in the quorum requirement. *FTC v. Flotill Products,* 389 U.S. 179 (1967). A quorum was not present at the time the Hopi Tribal Council approved or entered into the lease with the Church of Jesus Christ of the Latter Day Saints.

Mr. Nayatewa will need additional information from the government's files to aid in the prosecution of his appeal. The materials received with the decision of the Phoenix Area Office did not include a copy of the lease itself. We note on the basis of the information received thus far that there may be a further irregularity in that the Tribal Council resolution (H–6–71) purported to approve a lease between the Sand Clan and the Church of Jesus Christ of the Latter Day Saints, but the Tribal Council then apparently proceeded to enter into the lease in its own right. Obviously, resolution H–6–71 did not authorize the Tribal Council to enter into a lease, but only to approve a proposed lease by the Sand Clan to the Church.

In addition to the lease, we request 1) a certified copy of the Solicitor's memorandum holding that the Tribal Council does not have authority under the Hopi Constitution to lease village lands (Attachment 2 to this letter); and 2) access to all of the government documents dealing with the Hopi Constitution, including the history of its preparation and adoption and any subsequent material bearing on the interpretatin of its provisions. For example, if the Secretary relied on any Solicitor's analysis, memorandum or opinion before purporting to delegate authority to lease on the Hopi Tribal Council, we would like copies of such documents. Please advise us at your earliest convenience when and where this material will be made available for our inspection.

In the original appeal letter of April 26, 1971, I requested certain information concerning the requirements for a quorum of the Hopi Tribal Council. The Area

Office's response on this point in its June 3, 1971 letter was not completely satisfactory. What I want to know in concrete terms is the minimum number of members of the Hopi Tribal Council that have actually transacted business at any Tribal Council meeting. The response of the Area Office states that, "A few years back, there were several meetings that were delayed until a quorum was present." How many members were present when it was determined at that time that a quorum was not present? More specifically, has the Tribal Council ever transacted business with any less than 9 members present when there were 17 authorized seats on the Council, 10 members present when there were 18 authorized Council seats, and so on?

Please advise us of the procedure to be followed in the determination of this appeal at your earliest convenience.

Very truly yours,

Robert S. Pelcyger.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., December 14, 1937.

MEMORANDUM TO THE COMMISSIONER OF INDIAN AFFAIRS: The Hopi Tribal Council on October 5 passed a resolution accepting and adopting sections 1 and 2 of Chapter 3 on Domestic Relations, of the Law and Order Regulations approved by the Secretary of the Interior on November 27, 1935. This resolution was approved by the Superintendent on October 6. The Indian Office has prepared for the approval of the Assistant Secretary a letter to the chairman of the Hopi Tribal Council stating that this ordinance was adopted pursuant to Article VI, section 1(g) of the Hopi Constitution, became effective on approval of the Superintendent, and that no reason is found requiring its recission by the Secretary.

In the consideration of this resolution in the Indian Office the provisions of Article III of the Hopi Constitution seem to have been overlooked. In section 2(b) of this article the regulation of family relations is reserved tothe self-governing villages which compose the Hopi Tribe. The reservation to the villages of the control of local matters is a cardinal feature of the Hopi Constitution. Mr. Oliver LaFarge who drafted this constitution with the Indians, in reporting at various times to the Commissioner of Indian Affairs, explained that Article III was intended to protect the entity of the individual villages and to reserve to them the powers which they then had. The Hopi tribal organization was to be a union of self-governing villages to provide a mechanism for handling certain inter-village affairs. Accordingly, the enumerated powers of the Tribal Council were to be as close to the legal minimum as possible. However, the intent of the framers of the constitution need not be relied upon as Article III is a clear reservation of the control of family relations to the villages, even though Article VI, section 1(g), would permit the Tribal Council to make general ordinances to protect tribal peace and welfare.

Accordingly, I believe this resolution of the Hopi Tribal Council must be rescinded as not in conformity with the constitution. The resolution would accept as applicable to the Hopi Tribe the provision in the Law and Order Regulations that the Tribal Council shall have authority to determine whether Indian custom marriage and divorce shall be recongized in the future as lawful and what shall constitute such marriage and divorce. Such determination and definition would be a principal function of the regulation of family relations. It is suggested that the Tribal Council be advised of this constitutional impediment to their action in this field, but that they be invited to indorse this office of any special problems on the reservation which they intended to cope with in this resolution, so that we may be able to advise them further in this connection. It appears that no information was submitted with this resolution which would explain its adoption.

It is also suggested that in the letter to the Tribal Council to be signed by the Assistant Secretary rescinding this ordinance it be stated that the definition of the term Tribal Council in section 19 of Chapter I of the Law and Order Regulations for the Navajo and Hopi jurisdictions (which, incidentally, supplant the general law and order regulations referred to in the Tribal Council's resolution) shall be construed to include the governing body of the village wherever in the Hopi Constitution the village rather than the entire tribe possesses tribal powers involved in the Law and Order Regulations. A formal amendment of these reguations is not considered necessary as they may properly be construed in the light of the provisions of the constitution, and to the extent that the villages both before and after the adoption of the constitution had and have self-governing

powers they may be considered "tribes" within the meaning of the term in section 19, Chapter 1, of the regulations.

NATHAN R. MARGOLD, *Solicitor.*

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington 25, D.C.

Memorandum
To: Commissioner of Indian Affairs.
From: Assistant Solicitor, Indian Legal Activities.
Subject: Request for legal opinion regarding the leasing authority of the Hopi Tribal Council.

You request an opinion concerning the extent of leasing authority vested in the Hopi Tribal Council and in the separate village governing bodies.

It appears from the Hopi Tribal constitution that the Hopi Tribe intended to restrict the powers delegated to the Tribal Council, and to retain in the Tribe all tribal powers not specifically delegated. Article VI, concerning the Powers of the Tribal Council, provides that it "shall have the following powers which the Tribe now has under existing law or which have been given to the Tribe by the Act of June 18, 1934." Specific authority is then given "To prevent the sale, disposition, lease or encumbrance of tribal lands, or other tribal property" (Section 1(c)), but no authority is specifically delegated to do any of these acts. Nor is general authority to transact tribal business included in the specifically delegated powers. Section 1(a) authorizes the Council "To reprsent and speak for the Hopi Tribe in all matters for the welfare of the Tribe, * * *." If this were construed broadly to cover dealings with tribal property there would be no need for the numerous specific delegations of power; it refers, evidently, to social welfare. For example, Article VII entitled "Land" provides that "Unoccupied land beyond clan and villages holdings shall be opened to the use of any member of the Tribe, under the supervision of the Tribal Council" (Section 1), and that range lands "shall be supervised by the Tribal Council", but only "in order to improve and preserve them." (Section 2).

This limited view is also substantiated by the provision of Section 3, Article VI, which states that the council "may exercise such further powers as in the future may be delegated to it * * *."

The powers of the Villages are of a different nature. The January 1, 1954 lease to which you refer was made by the Kyakotsmovi Village, not by the Tribal Council. The Tribal Constitution provides that villages which do not "possess the traditional Hopi self-government, or which wish to make a change in that government * * * may adopt a village constitution * * *." The implication is that the villages continue their self-government functions. The resolution of the Tribal Council of September 28, 1954, which "approved, ratified, and confirmed" that lease, was not an exercise of authority. It was a specific expression of opinion that the Village "has the property rights of the land within said Village" which was being leased, and that the Council recognized the right of the villages "to lease the lands described in said lease. Therefore, it should not be assumed that there is an inconsistancy in the governmental approval of this lease. If a Hopi village's traditional power of self-government included the power to lease village land, or the village has adopted a constitution which does not expressly or impliedly prohibit leasing of village land, such a lease would be valid provided it is properly executed and is not contrary to the provisions of Federal law or regulations concerning the leasing of Indian lands.

FRANKLIN C. SALISBURY,
Assistant Solicitor, Indian Legal Activities.

NATIVE AMERICAN RIGHTS FUND
Berkeley, Calif., July 13, 1971.

Re: Appeal of BIA approval of a lease of First Mesa lands on the Hopi Reservation to the Church of Jesus Christ of Latter Day Saints.
Hon. LOUIS R. BRUCE, *Commissioner, Bureau of Indian Affairs, Department of the Interior, Washington, D.C.*

DEAR MR. COMMISSIONER: On June 22, 1971, I filed with the Phoenix Area Office an appeal in the above referenced proceeding on behalf of Mr. Ned

Nayatewa, Kirkmongwi of First Mesa. On June 25, 1971 I was informed that the appeal had been referred to your office. I have just returned to my office following a week in Washington and received a letter from Mr. Ned Nayatewa in which he informs me that he withdraws his appeal and no longer wishes to be represented by me in this proceeding. Mr. Nayatewa's letter to me of June 29, 1971 indicates that a copy was sent to you.

Following Mr. Nayatewa's withdrawal, seven Hopi religious leaders from the village of First Mesa have asked and authorized me to continue the appeal on their behalf. These individuals are:

1. Grant Peesha; 2. Gene Lahpoo; 3. Earl Mumvewa; 4. Stewart Tuvinaghtewa; 5. Preston Wakala; 6. Wesley Lesso; and 7. Frank Chappella.

Messrs. Peesha, Lahpoo, Mumvewa, Tuvinaghtewa, Wakala, Lesso and Chappella have opposed the lease for the reasons set forth in Mr. Nayatewa's appeals of April 26, 1971 addressed to Mr. Homer M. Gilliland and of June 22, 1971 addressed to Mr. George W. Hedden. Now that Mr. Nayatewa has withdrawn, they will follow through with the appeal because of their opposition to the lease and in order to resolve the important issues involved in the appeal.

We await word from you concerning the manner in which you propose to hear and determine this appeal. We also believe that a decision on our request to suspend BIA approval of the lease pending resolution of the appeal is long overdue. Construction of the church and recreation center is continuing despite the Acting Commissioner's decision on or about May 28, 1971 suspending BIA approval of the lease. Continued delay of a decision on the request for a suspension is tantamount to a denial of the appeal on the merits. Your prompt consideration of the suspension matter is required.

Sincerely yours,

ROBERT S. PELCYGER.

AUGUST 23, 1971.

Re Appeal of BIA approval of a lease of First Mesa lands on the Hopi Reservation to the Church of Jesus Christ of Latter Day Saints, Real Prop. Mgmt., Ten. & Mgmt.

Hon. LOUIS R. BRUCE,
Commissioner, Bureau of Indian Affairs, U.S. Department of the Interior, Washington, D.C.

DEAR COMMISSIONER BRUCE: This letter concerns the appeal by several members of the Hopi Tribe from the Village of First Mesa of the approval by the Bureau of Indian Affairs of a lease of First Mesa lands to the Church of Jesus Christ of Latter Day Saints, Southwest Indian Mission. By letter dated August 6, 1971 from Deputy Commissioner John O. Crow, we were informed that your office concurs in the decision of the Phoenix Area Office denying the appeal of Mr. Ned Nayatewa. We were also informed that your office summarily dismissed the appeals of Messrs. Peesha, Lahpoo, Mumzewa, Tuvinaghtewa, Nakala, Lesso and Chappella on the grounds that their appeal was not filed within the required time. Pursuant to 25 C.F.R. § 2, Messrs. Grant Peesha, Gene Lahpoo, Earl Mumzewa, Stewart Tuvinaghtewa, Preston Nakala, Wesley Lesso, and Frank Chappella hereby appeal these decisions to the Secretary of the Interior. The grounds on which the appeal is based are set forth in my letter of April 26 1971 addressed to the Superintendent of the Hopi Agency and my letter of June 22, 1971 to the Phoenix Area Office as supplemented by this letter.

In many respects, this appeal is the culmination of a long and sometimes bitter dispute between the Hopi Tribal Council and the religious leaders of the self-governing Hopi villages. The religious leaders of First Mesa have opposed the lease that is the subject of this appeal for many years. Over their strenuous opposition, the Hopi Tribal Council entered into the lease which was subsequently approved by the Bureau of Indian Affairs on March 17, 1971.

Ned Nayatewa, Frank Chappella and Wesley Lesso sent a telegram to the Secretary of the Interior protesting the lease and urging the Secretary to withhold his approval. Their telegram was answered by letter dated April 8, 1971 from Acting Associate Commissioner Eugene Suarez informing them that the lease had been approved. Mr. Nayatewa's appeal followed.

As First Mesa Kikmongwi, it was Mr. Nayatewa's responsibility, in the first instance, to initiate and prosecute this appeal. There was nothing for Mr. Chappella and Mr. Lesso and the other religious leaders of First Mesa to do so long as Mr. Nayatewa fulfilled this responsibility. However, once Mr. Nayatewa withdrew,

it became the obligation of the other First Mesa religious leaders to continue the appeal. No prejudice results. Exactly the same issues are in dispute and it is imperative that these issues be resolved on the merits since they affect in a fundamental way the relationship between the Hopi Villages and the Tribal Council.

25 C.F.R. § 2.36, cited in Mr. Crow's letter of August 6, 1971, provides in part:

"(c) No appeal shall be dismissed because of a procedural error or informality which is satisfactorily explained as being the result of ignorance, mistake, or circumstances beyond the control of the appellant.

The appeal of Messrs, Peesha, Lahpoo, Mumzewa, Tuvinaghtewa, Nakala, Lesso and Chappella should not have been summarily dismissed. Messrs. Chappella and Lesso, along with Mr. Nayatewa, originally protested the subject lease. Mr. Nayatewa's appeal was taken in his capacity as Kikmongwi of First Mesa on behalf of the people of his village who had opposed the lease. The fact that Mr. Nayatewa subsequently withdrew his appeal is certainly a "circumstance beyond the control" of the seven appellants that "satisfactorily explains" their later filing. Obviously, 25 C.F.S. § 2.36(c) was intended to discourage summary dismissal of appeals for technical or procedural reasons.

Regarding the merits of the appeal, for the reasons set forth in my letter of June 22, 1971 to the Phoenix Area Office, we remain convinced that an evidentiary hearing is required to resolve the conflicting claims of the Hopi Tribal Council and the appellants. We submit that resolving the complex legal and factual issues presented in this appeal against the appellants without a hearing in the high-handed and arbitrary fashion evidenced in the June 3, 1971 decision of the Phoenix Area Office constitutes a denial of appellants' rights to due process of law.

In Mr. Nayatewa's original petition addressed to the Superintendent of the Hopi Agency, we requested certain information to assist in the appeal, as provided in 25 C.F.R. § 2.10(a). We specifically requested "any legal opinions, memoranda or analyses of the provisions of the Hopi Constitution" cited in the letter. No such information was provided by Hopi Superintendent or the Phoenix Area Office. Yet we later obtained a copy of the Solicitor's memorandum, a copy of which is appended as attachment #2 to my letter of June 22, 1971, which is directly on point and holds that leasing authority was withheld from the Hopi Tribal Council and that the self-governing villages retain the power to lease village lands under the Hopi Constitution. It is incomprehensible to us that the Commissioner's office could confirm the June 3, 1971 decision of the Phoenix Area Office without even mentioning or referring to this Solicitor's analysis of the Hopi Constitution.

The Bureau of Indian Affairs has also refused to supply the appellants with the information requested in two separate letters regarding the quorum requirements of the Hopi Tribal Council. We want to know the minimum number of members of the Hopi Tribal Council that have actually transacted business at any Tribal Council meeting and the practical construction that has been given to Article IV, Section 6 of the Hopi Constitution by the Bureau of Indian Affairs and the Hopi Tribal Council.

After my letter of June 22, 1971 was written, we finally received a copy of the subject lease. A comparison of the lease with the Tribal Council resolution authorizing it and with the minutes of the February 1, 1971 Tribal Council meeting (at which the resolution was adopted) shows conclusively that the lease should not have received BIA approval. The resolution provides "that the proposed lease by the Sand Clan to the Church of Jesus Christ of Latter Day Saints . . . is hereby approved." The resolution did not authorize the Tribal Council to lease the lands, nor did it authorize the Chairman of the Hopi Tribal Council to enter into a lease on behalf of the Tribal Council or any other entity. The resolution merely "approved" the proposed lease between the Sand Clan and the Church. (It is interesting to note that the "approval" procedure set forth in the resolution closely parallels the method of leasing village lands that was approved in the Solicitor's memorandum previously referred to.) The minutes of the February 1 Tribal Council meeting confirm that the Council voted to do no more than "approve" a proposed lease between the Sand Clan and the Church. Yet the lease itself names the Hopi Tribe as lessor and was entered into by Mr. Clarence Hamilton. The rental is made payable to the "Treasurer, Hopi Tribe," not to the Sand Clan or any members of the Sand Clan. It is thus clear beyond any dispute that the action of the Chairman of the Hopi Tribal Council in entering into the subject lease was *ultra vires*.

There is a great deal of evidence in the record of this appeal that indicates that the leaders of the Sand Clan themselves acknowledged the legal necessity for

approval of the lease from the First Mesa Kikmongwi. On page 8 of the minutes of the February 1, 1971 Tribal Council meeting, Mr. Nayatewa's remarks in opposition to the subject lease are summarized. According to Mr. Nayatewa, Mr. Chuyon, the leader of the Sand Clan, acknowledged that without Mr. Nayatewa's approval, the church would not and could not be built.

In addition, in the petition to the Hopi Tribal Council dated January 10, 1971, there is a space for Mr. Nayatewa's signature acknowledging the authority of the Sand Clan leaders to execute the instrument. Significantly, Mr. Nayatewa did not sign the acknowledgment. It would appear from the petition that its signers thought it was necessary to obtain Mr. Nayatewa's acknowledgment to make the instrument valid. In the absence of Mr. Nayatewa's signature evidencing his consent, the petition has no force and effect.

The controversy surrounding the subject lease is part of a much larger drama between various elements of the Hopi Tribe that has been going on for decades. This appeal represents an attempt to resolve some of the issues through legal processes. The Bureau of Indian Affairs has often been accused of discriminating against the faction of the Hopi Tribe represented in part by the appellants and in favor of the Hopi Tribal Council. I must say that the manner in which this appeal has been treated by the Bureau so far confirms the charges of discrimination and favoritism that have been leveled against it. At the very least, the appellants are entitled to be heard and to present their side of the dispute, as to both facts and law, to a decision-maker with an open mind. Presumably, that is the purpose of the appeal process set forth in 25 C.F.R. § 2. Yet this most elemental right to due process of law has thus far been denied the appellants.

Please advise us of the procedure to be followed in the determination of this appeal at your earliest convenience.

Very truly yours,

ROBERT S. PELCYGER.

NATIVE AMERICAN RIGHTS FUND,
Boulder, Colo., October 6, 1971.

Re Appeal of BIA approval of a lease of First Mesa lands on the Hopi Reservation to the Church of Jesus Christ of the Latter Day Saints. Real Prop. Mgmt., Ten. & Mgmt.

Hon. LOUIS R. BRUCE, Commissioner, Bureau of Indian Affairs, U.S. Department of the Interior, Washington, D.C.

DEAR COMMISSIONER BRUCE: By letter dated August 23, 1971, I notified you that Hopi tribal members Grant Peesha, Gene Lahpoo, Earl Mumzewa, Stewart Tuvinaghtewa Preston Nakala, Westey Lesso, and Fran, Chappella were appealing to the Secretary of the Interior from the August 6, 1971, decision of Deputy Commissioner John O. Crow denying their appeal of BIA approval of a lease of First Mesa lands on the Hopi Reservation to the Church of Jesus Christ of the Latter Day Saints Southwest Indian Mission. In that letter, I also renewed my demand for a hearing on the merits and asked to be advised as soon as possible as to the procedure that this appeal would follow. I have not as yet received a response.

In the June 3, 1971, decision of the Phoenix Area Office upholding BIA approval of the lease in question Assistant Area Director George W. Hedden relied in part upon Section 2(g) of Act of May 22, 1970, for the proposition that the Hopi Tribal Council was authorized to lease lands within the Hopi Reservation. Mr. Crow concurred in this reasoning in his decision of August 6, 1971. In my letter of June 22, 1971, appealing the decision of the Area Office which is a part of this record on appeal, I pointed out that the legislative history of the May 22, 1970, act made it clear that the Act was not intended to authorize the Tribal Council to lease the village lands involved in this appeal. I made known at that time my intention to brief the question at an appropriate stage in the appeal process. Since I have not yet heard from you in regard to my demand for a hearing, I will take this opportunity to brief this and other issues.

The Act of May 22, 1970, 25 U.S.C. §§ 641–646 (84 Stat. 260) was enacted ". . . to provide the Hopi Tribal Council with certain powers of self-determination that are necessary to enable the Hopi people to carry out the effective development and operation of the Hopi Industrial Park. . . ." 25 U.S.C. § 641. The Hopi Industrial Park consists of 200 acres of donated land just outside Winslow, Arizona, about 40 miles south of the Hopi Reservation. The only purpose of the

bill was to give the governing body of the Hopi Tribe the authority necessary for expanding and developing the Industrial Park.

In its June 3, 1971, decision the Area Office relied on Section 2(g) of the Act, 25 U.S.C. § 642(g), which reads:

> The Hopi Tribal Council shall have the following powers:
>
> * * * * * * *
>
> (g) To lease lands within the Hopi Industrial Park, any other tribal lands, and the improvements thereon, in accordance with the provisions of Federal laws.

In light of the legislative intent of the Act, which is to promote the development and expansion of the Hopi Industrial Park, this section of the Act does not authorize the leasing of the First Mesa lands in question which are sought by the Tribal Council for a purpose unrelated to the Industrial Park, i.e., the construction of a church.

Furthermore, the lands in question are not "tribal lands" within the meaning of Section 2(g) of the Act. They are clan lands controlled according to village custom and the Tribal Council has no authority over them as recognized by Article VII, Section 1 of the Hopi Constitution. That section provides that the use of these clan lands is to be decided according to "established village custom" and this requires the approval of the Kikmongwi of the consolidated villages of First Mesa in this instance, not the consent of those who represent themselves as Sand Clan leaders and certainly not the Hopi Tribal Council.

Even if the lands in question could be considered "tribal lands," Section 2(g) provides for the leasing of tribal lands only "in accordance with the provisions of Federal law." It is clear, therefore, in keeping with the legislative intent of the Act, that the Act does not provide any *new* leasing authority with respect to tribal lands to the Hopi Tribal Council. New leasing authority is given only with respect to the Hopi Industrial Park. This fact is substantiated in a letter attached as Exhibit A from Representative James A. Haley, Chairman of the House Subcommittee on Indian Affairs, to Major Caleb H. Johnson, Chaplain, United States Army, and a Hopi, in response to a specific inquiry attached as Exhibit B, from Major Johnson concerning the 1970 Act. Representative Haley said in reference to Section 2(g) of the Act:

> You were correctly advised that *this bill grants new lease authority only with respect to the Hopi Industrial Park.* The provisions of subsection (g) to which you refer merely restate and clarify the present law. You will note that it grants authority to lease tribal lands *only* in accordance with the provisions of other Federal laws that may be in effect at that time. *Subsection (g) itself grants no new authority.* (Emphasis added.)

Section 2(g), then, does not by itself authorize the Tribal Council to lease tribal lands.

In its June 3, 1971, decision, however, the Area Office also cited 25 U.S.C. § 635(a) and 25 U.S.C. § 415 as leasing authority for the Hopi Tribal Council. Both of the statutes referred to provide for the leasing to be done by "the Indian owners." With reference to the land involved in this appeal, the Hopi Tribal Council is not "the Indian owner." Again, Article VII, Section 1 of the Hopi Constitution vests the power over these clan lands in the village and not in the Tribal Council. The regulations implementing these leasing statutes, 25 CFR 131.3(4), providing for leasing by "appropriate officials" of the Tribe, must also be construed to mean the village chief and not the Tribal Council.

Moreover, Article VI, Section 1(c) of the Hopi Constitution withholds from the Tribal Council the power to lease tribal lands. This power still resides with the Hopi Tribe which must be considered "the Indian owner" and it must be recognized that the Tribe has not authorized the Tribal Council as the "appropriate officials" to lease its lands. The Secretary of the Interior is not empowered under the leasing statutes cited to delegate this leasing authority to the Tribal Council in direct violation of the Hopi Constitution and the rights of the Hopi Tribe. (See the Memorandum of Points and Authorities in Support of Motion for Summary Judgment and the First Supplemental Memorandum of Points and Authorities in Support of Summary Judgment, in the case of *Lomayaktewa, et al., v. Morton, et al.*, Civil No. 974–71, U.S.D.C., District of Columbia, attached as Exhibits C and D to this letter.)

The net result is that existing Federal Law (which, of course, includes the provisions of the Hopi Constitution and excludes the illegal purported delegations of leasing authority from the Secretary of the Interior to the Tribal Council) does not authorize the Tribal Council to lease the lands in question. Therefore,

since 25 U.S.C. § 642(g) does not provide any new leasing authority with respect to lands outside the Hopi Industrial Park, but rather incorporates the provisions and limitations of existing Federal law, 25 U.S.C. § 642(g) does not authorize the Tribal Council to lease the First Mesa lands to the Church of Jesus Christ of the Latter Day Saints.

Even if the Hopi Tribal Council could be considered "the Indian owners" or "appropriate officials" for purposes of this lease, it is clear that this *particulay* "Tribal Council" which authorized the lease on February 1, 1971, is not legallir constituted and cannot be recognized as the legal governing body of the Hop, Tribe under the Hopi Constitution. As I pointed out in my letter of April 26, 1971, the certification procedures set out in Article I V, Section 4 and Article III Sections 3 and 4, have not been followed in seating the group which purported to act on February 1, 1971, as the Tribal Council. The quorum requirements in Article IV, Section 6, consequently, were not satisfied, and the actions taken that day are of no force and effect.

In the June 3, 1971, decision, the Area Office attempted to validate the Tribal Council as it existed. The three representatives purportedly certified by "Governors"—two from Kykotsmovi and one fram Bacabi—cannot be considered to be "certified" under the Constitution. These two villages have no written village constitutions empowering a Governor to certify representatives to the Council, so under Article III, Section 3 of the Hopi Constitution, they are still under the traditional Hopi organization and the village Kikmongwi must do any certification that is done. The "Governors" have no legal status whatsoever and therefore the three representatives they purported to certify are not legal representatives.

In addition to this, the complainants in this appeal assert that Hale Sekacucu, who represents himself as Kikmongwi of Sipaulavi, and Myron Polequaptewa, who represents himself as Kikmongwi of Oraibi, are not, in fact, Kikmongwis, and have no authority to certify representatives to the Council from their villages. The three people that they purportedly certified, then, are not legal representatives.

This brings the total unauthorized representatives to six. When added to the seven vacancies on the Council, a total of thirteen seats on the Council are not filled. Under Article IV, Section 6, which requires a majority for a quorum, no quorum of the Tribal Council can be held to exist. Only eight positions are filled out of a total of twenty-one, and this is not a majority.

Our position on the improper certifications and on the quorum requirement are set forth in some detail in Exhibits E., F & G to his letter. Exhibit E consists of the relevant section of a recent memorandum of points and authorities filed in the *Lomayaktewa, et al., v. Morton, et al.*, litigation cited above. Exhibits F and G are documents also on file in that case which reveal that the quorum provision of the Hopi Constitution has been interpreted by the Bureau of Indian Affairs as requiring the attendance of a majority of the total seats on the Council, regardless of any vacancies that may exist from time to time.

The Bureau of Indian Affairs is bound by the provisions of the Hopi Constitution and cannot, under the law, permit this illegally constituted body to represent themselves as the governing body of the Hopi Tribe.

This concludes my additional arguments. I will await further word on my request for a hearing on these matters in advance of the decision by the Secretary of the Interior.

Sincerely,

ROBERT S. PELCYGER.

NATIVE AMERICAN RIGHTS FUND,
Boulder, Colo., November 19, 1971.

Re appeal of BIA approval of a lease of First Mesa lands on the Hopi Reservation to the Church of Jesus Christ of the Latter-day Saints.

Mr. HARRISON LOESCH,
Assistant Secretary of the Interior, U.S. Department of the Interior, Office of the Secretary, Washington, D.C.

DEAR ASSISTANT SECRETARY LOESCH: Thank you for your letter of November 2, 1971. This letter will constitute our position on the summary dismissal by the Commissioner of Indian Affairs in the above referenced appeal, as set forth in Deputy Commissioner Crow's letter of August 6, 1971.

In summary, our position is simply that (a) the appeal which was originally instituted by Mr. Nayatewa remained in effect at all times since the discharge of his attorney did not operate to dismiss that appeal; (b) there has been a mere, non-prejudicial substitution of parties which in no way has enlarged or expanded the original scope of this proceeding; and (c) the rules governing administrative appeals (25 C.F.R. § 2) should not be so technically construed as to deny the aggrieved appellants the right to have their claims adjudicated on the merits.

I. FACTS

The lease in question has consistently been opposed by the present appellants, by original appellant Nayatewa, and by other members, of the Village of First Mesa. As background information, it is important to note that Frank Chappella and Wesley Lesso (both of whom are present appellants) and Ned Nayatewa (the original appellant) all urged the Secretary of the Interior to withhold his approval of the lease; this protest was made shortly after the Tribal Council originally approved the lease (see letter from Robert Pelcyger to Commissioner Bruce, August 23, 1971, p. 2). In addition, three present appellants, the original appellant, and eight other tribal members signified their intention to appeal the decision of the Agency Superintendent (see Exhibit A, which is attached to this letter).

The appeal to the Commissioner was originally taken by Mr. Nayatewa *on behalf* of all religious leaders of First Mesa (see letter of Robert Pelcyger to Commissioner Bruce, August 23, 1971, p. 2). Indeed, the three present appellants who had signified their intention to appeal (Exhibit A) elected not to join Mr. Nayatewa's appeal since Mr. Nayatewa was acting in his representative capacity as Kikmongwi of the Village of First Mesa. When Mr. Nayatewa advised me as his attorney (with a copy to the Commissioner) that he no longer wished to fulfill this responsibility, the other religious leaders of First Mesa sought simply to step into Mr. Nayatewa's shoes.

The specific chronology in regard to the summary dismissal is as follows:

June 3, 1971: Ruling by Phoenix Area Office against the issues presented by appellants.

June 22, 1971: Appeal by Mr. Nayatewa to the Commissioner of Indian Affairs.

June 29, 1971: Letter from Mr. Nayatewa to me as his attorney (copy to the Commissioner) with instructions to "withdraw" his appeal.

No further action taken by any party or by the Commissioner of Indian Affairs until:

July 13, 1971: Letter from Robert Pelcyger advising the Commissioner that the seven present appellants "have asked and authorized me to *continue the appeal* on their behalf. . . . they will *follow through* with the appeal . . ." (emphasis supplied).

August 6, 1971: Ruling by Commissioner of Indian Affairs against the issues presented by appellants.

August 23, 1971: Appeal to Secretary of the Interior.

The basis of the Commissioner's summary dismissal of the appeal was his assumption that "the file was closed" on Mr. Nayatewa's appeal upon receipt in his office of a photographic copy of Mr. Nayatewa's letter to me of June 29, 1971. In the Commissioner's view, since the file had been closed when the present appellants sought to continue Mr. Nayatewa's appeal, there was no appeal left to continue. Treating the attempt by the present appellants to continue the appeal as an attempt to initiate a new proceeding, the Commissioner ruled that the appeal was barred by the time requirements of 25 C.F.R. § 2.10(a).

The Commissioner erred in several respects. Our argument is set forth below. At the outset, however, I want to clarify certain language in my July 13, 1971 letter to Commissioner Bruce which was emphasized in Mr. Crow's response of August 6, 1971. Taken in context, the clause, "Following Mr. Nayatewa's withdrawal," in my July 13 letter was not used in any technical sense, but was obviously intended to refer to Mr. Nayatewa's announcement to the other religious leaders of his Village of his decision to withdraw his appeal. It was, admittedly, after the announcement of his decision, but before his actual withdrawal, that the seven present appellants sought to participate in this proceeding.

II. ARGUMENT

A. Dismissal of attorney does not act to withdraw an appeal

The appeal was not automatically terminated simply by Mr. Nayatewa's letter dismissing his attorney. It is a basic principle that a party must act through his attorney. See, *e.g.*, *Eury* v. *Huff*, 141 F. 2d 554, 555 (4th Cir. 1944); and 7 C.J.S. *Attorney and Client*, § 80(b), p. 901:

> [A]n attempt by the client to stipulate or act with reference to the conduct or disposal of the proceedings will not be recognized or entertained by the court unless the same is signed or assented to by the attorney of record . . . .

The applicable regulations are explicit on this point. 25 C.F.R. § 2.33(c) provides that "In all cases where a party is represented by an attorney, such attorney shall be recognized as *fully controlling the same on behalf of his client* . . . ." (emphasis added). Thus it is clear that the Commissioner was without jurisdiction to take any action merely upon receipt of a copy of a communication between the original appellant and his attorney. The wisdom of this rule is even more evident in cases such as this one where the original appellant is acting in a representative capacity for members of a class and where the obligations of an attorney extend beyond the confines of any one individual.

B. The Commissioner failed to dismiss the appeal

The Commissioner never acted to dismiss the appeal before the substitution was made. The applicable procedure requires a written order:

> The Commissioner or the Area Director will render a *written decision in each case appealed to him*, copies of which will be mailed to all interested parties. 25 C.F.R. § 2.13 (emphasis supplied).

The Administrative Procedure Act also requires that "all decisions . . . shall include a statement of . . . the appropriate . . . order . . . ." 5.U.S.C. § 557(c). There was, then, no withdrawal or dismissal prior to the substitution for the additional reason that no order was made by the Commissioner.

A written dismissal order is no mere technicality. The beginning of the time for appeal would be uncertain in the absence of a written order. Furthermore, a request for voluntary dismissal must be sanctioned by the hearing officer. We have found no Interior Department decisions directly on point, but the federal courts do not permit voluntary dismissal without the consent of the judge. See, *e.g.*, *Piedmont Interstate Fair Assoc. v. Bean*, 209 F.2d 942, 947 (4th Cir. 1954); *Klintworth v. Atlantic Coast Line R. Co.*, 39 F.R.D. 330, 332 (D. S.C. 1966). The N.L.R.B. rule is that a letter "withdrawing" a charge is not operative. *N.L.R.B. v. Federal Engineering Co.*, 153 F.2d 233, 234 (6th Cir. 1946). Such a review for the purposes of fairness is every bit as important in these proceedings, as can be seen from the case at bar: if the purported withdrawal here were not reviewed for fairness, then the present, equally interested appellants would be denied their day in court on the very issues which were presented by the original appellant.

C. Substitution was proper

Substitution of, and intervention by, parties are appropriate procedures in administrative proceedings, as well as in the courts.[1] Although we have found no specific Interior Department decision on point,[2] we are sure that substitution and intervention are permissible in these proceedings, where technical procedural barriers should not bar relief. See, *e.g.*, *Albertson v. F.C.C.*, 182 F. 2d 397, 400–401 (D.C. Cir. 1950). The seven present appellants are plainly proper parties on appeal because each of them is a "person whose interests would be adversely affected by proceedings" under the supervision of an Area Director of the Bureau of Indian Affairs. 25 C.F.R. § 2.1(c), 2.3. As I explained in my letter of August 23, the present appellants, like the original appellant, are religious leaders of the Village of First Mesa who object to the execution of the lease in question.

The original appeal had not been dismissed by the time my letter of substitution was received by the Commissioner. Since the original appeal was never dismissed and since the appellants were simply substituted as parties on appeal, the Commissioner erred in concluding that appellants could be subject to summary dis-

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[1] SS, *e.g.*, *Devany v. United States*, 366 F. 2d 807, 808–809 (2d Cir. 1966) (substitution); *City of San Antonio v. Aeronautics Board*, 374 F. 2d 326 (D.C. Cir. 1967) (intervention).

[2] One analogous situation in the Interior Department decisions is found in the cases permitting a corporate entity to continue an appeal even though the notice of appeal was signed by an officer without designation of his corporate status. *Appeal of Edisto Construction Company*, 71 I.D. 68 (1964); *Appeal of Berkely Pipeline Construction, Inc.*, 68I.D. 103 (1961).

missal under 25 C.F.R. § 2.36(b) for not timely filing the notice of appeal. *The operative notice of appeal was the original appellant's notice, which was undisputedly timely filed and which had never been dismissed.* Appellants who are substituted in as parties *after* a proper notice of appeal has been filed need not, of course, timely file a notice of appeal; such a procedure would effectively bar all substitution on appeal. Rather, the controlling principle was plainly the "saving" language of 25 C.F.R. § 2.36:

> No appeal shall be dismissed because of a procedural error or informality which is statisfactorily explained as being the result of ignorance, mistake, or which is satisfactorily explained as being the result ignorance, mistake, or circumstances beyond the control of the appellant.[3]

Here, the "circumstances beyond the control of appellant[s]" was Mr. Nayatewa's decision to dismiss his attorney. As the record clearly demonstrates, Mr. Nayatewa had been acting in his capacity as Kikmongwi, or religious leader, of First Mesa. As Kikmongwi he was representing" all the people of First Mesa and there was no necessity for anyone other than the Kikmongwi to protest the actions of the Tribal Council and the Bureau of Indian Affairs. However, his unexpected change of attitude (the circumstances of this change will be described hereinafter), which was beyond the control of the present appellants, required a substitution of parties.

In a real sense, this proceeding is in the nature of a "class action." When a member of the class decides not to prosecute his claim, other bona fide members of the same class have the right to continue the action.[4]

III. EVEN IF THE APPEAL HAD BEEN DISMISSED, THE COMMISSIONER SHOULD HAVE REOPENED THE APPEAL

We think the above discussion establishes that the appeal was never dismissed. If it had been dismissed, however, the Commissioner still had authority to permit the substitution or intervention of the present appellants.

Whenever possible, courts and administrative agencies should be accessible. This principle has particular efficacy when the issues raised affect matters of vital concern to a community. In *Smuck* v. *Hobson*, 408 F. 2d 175 (D.C. Cir. 1969), the D.C. Court of Appeals, sitting *en banc* held that parents of school age children could participate in the proceedings for the first time at the appellate level because of the nature of the issues they raised and since denial of their access to the proceeding would leave them with no alternative but to start a new and separate action. 408 F. 2d at 181. Here, summary dismissal leaves the present appellants with no alternative, once their administrative remedies are exhausted, but to seek judicial review. The result of summary dismissal at this stage, without either the Solicitor's determination of the substantive issues of law, or an administrative hearing to resolve the disputed issues of fact, would leave a bare record on which to base judicial review.

An administrative agency retains jurisdiction to reopen a case even after a final order has been entered. *Anchor Line Limited v. Federal Maritime Commission*, 299 F. 2d 124, 125 (D.C. Cir. 1962); *Kwasizur v. Cardillo*, 175 F. 2d 235, 237 (3d Cir. 1949). This power is analogous to the rule that a court's dismissal is not final and the case can be reopened, unless the dismissal order specifically states that the dismissal was with prejudice. See, *e.g.*, *Perry v. United States*, 225 F. 2d 724 (9th Cir. 1955); *King v. Mordowanec*, 46 F.R.D. 474, 479–480 (D. R.I. 1969), for cases arising in the federal courts. All tribunals, including administrative agencies, have an inherent power to correct mistakes resulting from oversight or inadvertence. See *American Trucking Assoc. v. Frisco Transportation Co.*, 358 U.S. 133, 145 (1958); see also *Strickland Transportation Co. v. United States*, 274 F. Supp. 921, 926 (N.D. Tex. 1967), *aff'd*, 389 U.S. 574 (1968) (dealing with administrative agencies).

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[3] This provision is identical with the general administrative law principle that technicalities should not override equities in the absence of a clear provision to the contrary. See, *e.g.*, *Marzall v. Libby, McNiell & Libby*, 188 F. 2d 1013, 1016 (D.C. Cir. 1951).

[4] Mr. Nayatewa is much like a "public interest plaintiff." There is ample authority supporting the right of individuals to raise important issues affecting not only themselves, but large groups or communities. *F.C.C.* v. *Sanders Bros.*, 309 U.S. 470 (1940); *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943) (vacated on suggestion of mootness) 320 U.S. 707 (1943); *Office of Communications of United Church of Christ* v. *F.C.C.*, 359 F. 2d 994 (D.C. Cir. 1966). These three cases embody the principle that administrative agencies should go out of their way to hear and consider the views of interested members of the public.

More specifically, 25 C.F.R. § 2.35 provides:

Extensions of time

> The period for filing or serving any document may be extended or waived on behalf of an interested party by the officer to whom the appeal is taken, for good cause found by the officer. The Secretary in his discretion may extend or waive any time limitation established by these regulations.

Obviously, the Commissioner was not *required* to dismiss summarily the appeal. 25 C.F.R. §§ 2.35 and 2.36 taken together clearly support a broad administrative policy to resolve administrative appeals on the merits and to avoid, whenever and wherever possible, a dismissal on technical, procedural grounds. All other considerations aside, 25 C.F.R. § 2.35 vests the Secretary with discretion to hear and resolve this appeal on the merits by waiving "*any*" time limitation. We submit that the equities of this case, as set forth more particularly in the next section of this letter, must result in the exercise of the Secretary's discretion to hear this appeal. The failure to waive any time limitations which may be applicable would be a clear abuse of Secretarial discretion.

It is apparent from the Commissioner's discussion at p. 2 of his letter of August 6, 1971, that he did not realize that he had the discretion to reopen the appeal. Thus, at the very least, the matter should be remanded to the Commissioner for a ruling on the requested substitution of the seven new appellants.[5] If the Commissioner rules that there are proper grounds for reopening the appeal, the Commissioner can then rule on the merits.

IV. EQUITIES OF THE CASE REQUIRE CONSIDERATION OF APPEAL ON THE MERITS.

In addition to the legal arguments made above, which establish that the appeal was never withdrawn or dismissed and that the regulations were not intended to be technically construed to foreclose a review of the merits of appellant's contentions, general equitable principles require that the present appellants be allowed to continue this proceeding. The Department of the Interior, acting through the Bureau of Indian Affairs, was largely responsible for Mr. Nayatewa's decision to withdraw from this proceeding.

We have reason to believe that your files will contain correspondence which establishes that pressure was applied to Mr. Nayatewa. Richard Nayatewa, Ned Nayatewa's son, had applied to the Tribal Council to lease land for the purposes of operating a gasoline service station. Approval of the lease by the Area Director was held in abeyance, at the request of the Chairman of the Hopi Tribal Council, pending the outcome of this proceeding. Under this pressure, applied at least in part by the Phoenix Area Office, and realizing that his son's future business plans would be foreclosed unless he took steps to terminate this appeal, Mr. Nayatewa sent a dismissal letter to his attorney. Once Mr. Nayatewa took action to withdraw his appeal, the Chairman of the Hopi Tribal Council immediately wrote to the Phoenix Area Office with instructions to go ahead and approve the lease. Thus, the Bureau of Indian Affairs allowed itself to be used in a crude effort to thwart this appeal.

The long standing dispute between the traditional Hopis and the Tribal Council is a matter of public record. Sixty-two Hopi traditionals recently filed suit in United States District Court challenging the Interior Department's approval of the Black Mesa coal mine lease. They charged that the Hopi Constitution has not been adhered to, and that the Bureau had taken sides in this dispute, to their detriment. Now, in addition to this alleged breach of the Secretary's trust responsibility by favoring the progressives, the Department is attempting to block legal avenues by which the traditionals may redress their grievances. Having helped coerce Mr. Nayatewa to change his position and withdraw, the Department now seizes upon Mr. Nayatewa's action as a pretext to block consideration of the merits of these appellants' contentions. We submit that the Department, having caused this withdrawal, cannot now use it as the procedural pretext to block the continued prosecution of this appeal.

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[5] Although such a ruling should perhaps technically be made by the Commissioner, we fail to see any grounds for his *not* reopening the appeal. Any error was plainly inadvertant. I promptly attempted to correct the situation. The facts and issues raised by the present appellants are precisely identical. There is no additional burden on any interested party for the matter to be litigated by the present appellants, rather than by the original appellant.

V. CONCLUSION

The Secretary of the Interior has before him an issue of vital importance to all Hopi people residing on First Mesa. Mr. Ned Nayatewa, acting in his representative capacity in behalf of all members of the consolidated villages of First Mesa, appealed the Agency Superintendent's approval of a lease to the Mormon Church. After pressure was applied to Mr. Nayatewa by the Tribal Council and the Bureau of Indian Affairs, he decided to dismiss his attorney and directed him to withdraw his appeal. At the same time that Mr. Nayatewa's withdrawal was effectuated by his attorney, and before the Commissioner issued an order dismissing Mr. Nayatewa's appeal, the seven present appellants stepped into Mr. Nayatewa's shoes for the purposes of continuing this appeal. The Commissioner failed to realize that he still retained jurisdiction after the original appellant's dismissal letter was sent to his attorney. All of the applicable technical rules, as well as the broader principles of administrative review, favor determination of this appeal on the merits. The question before the Secretary of the Interior is simple and straightforward. Under the guise of following the regulations, he can take the "easy way out" by adopting a tortuous and mistaken construction, which has the effect of allowing him to bypass the merits of the controversy and denying the appellants access to the legal process. Alternately, the Secretary may reach the correct result by either exercising his descretion under 25 C.F.R. § 2.35, or by adopting the arguments on the facts and the construction of the applicable law urged in this letter.

In your letter of November 2, 1971, you suggest that if it is determined that the Commissioner's summary dismissal was not proper, the entire matter will be remanded to the Bureau for consideration of the merits. While we do not strongly oppose the possibility of remand to the Bureau, we do note that it will serve no useful purpose since Deputy Commissioner Crow's letter of August 6, 1971 specifically concurs in the decision, and the reasons given in support of the decision, of the Assistant Area Director of June 3, 1971.

Finally, we direct your attention to the history of this appeal as it relates to our repeated requests for a suspension of the Bureau's approval of the lease, pending the outcome of the appeal, pursuant to 25 C.F.R. § 2.10(b). At one point, last May, the Acting Commissioner of Indian Affairs did suspend the BIA's approval of the lease, pending the outcome of this appeal, but it seems to have been ignored. It would seem that no better circumstances for the application of the suspension procedure could be imagined. We urge an immediate determination by your office of whether to suspend BIA approval of the lease pending the outcome of this appeal.

Very truly yours,

ROBERT S. PELCYGER.

WADE HEAD DLY 75

AREA DIRECTOR BUREAU OF INDIAN AFFAIRS

124 WEST THOMAS ROAD (MONDAY AM DLY OK)

ON BEHALF OF NED NAYATEWA, FRANK CHAPELLA, WESLEY LESSO, MR TALA, WOODROW PRESTON, PRESTON NAKALA, CARLOTTA SHATTUCK, STAPLEY LOMAYAKTEWA, MINA LANSA, CYRUS N JOSYTEWA, CLAUD KEWANYANA AND JACK PONGAYESVIA, I HEREBY APPEAL THE MARCH 17 1971 DECISION OF THE HOPI SUPERINTENDENT APPROVING THE LEASE OF LAND AT FIRST MESA TO THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS. PAPERS WILL FOLLOW.

RECEIVED APR 21 1971

PELCYGER

MAIL COPY TO ROBERT 108C WEST WASHINGTON AVE ESCONDIDO CALIF 92025

DATE RR APR 16 1150PMM

MIN NL PDB (CFN DLY-75-FURN)

BD:COMM ACCT

PHOENIX ARIZ

SIGNATURE

THOMAS BANYACYA

2.520TD CLK:HG

CARAVAN INN ROOM 275 7551

ROBERT PELCYGER--GUE

SIGNATURE

APPENDIX II

1. INFORMATION AND DETAIL SHEETS ON BOUNDARY, TITLE, AND WATER PROBLEMS IN PHOENIX AREA, SUPPLIED BY BIA AREA OFFICE

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
Phoenix, Ariz., October 15, 1971.

Mr. TOM SUSMAN,
Senate Subcommittee on Administrative Practices and Procedures,
Washington, D.C.

DEAR MR. SUSMAN In accordance with your request of October 14, we are enclosing information about boundary, title and water problems in the Phoenix Area. One memorandum and enclosed detail was prepared in 1970. On the detail sheets we have noted some of the more current developments. A second listing, which covers many of the same points, was prepared within the last month.

We hope these will be of assistance to you.

Sincerely yours,

CHARLES WORTHMAN,
Acting Assistant Area Director.

Enclosures.

NOVEMBER 20, 1970.

Memorandum to: Commissioner of Indian Affairs. Attention: Acting Director, Economic Development.

From: Assistant Area Director (Economic Development).

Subject: Program priorities—Economic Development.

On October 27, 1970, we forwarded you a memorandum on the above subject setting forth by priority stressing problems as to land titles and boundaries; and by a separate schedule, priorities as to water rights problems. There is a need to amend the latter.

On the Gila River in the upper valleys above the San Carlos Reservoir as the storage point there has been an increasing amount of pumping which we consider to be illegal under the terms of the Gila River Decree. Recently our attention has been brought to the J. Ed Smith well which is pumping water to the Producers Minerals Peacock Mining. The case has been placed before the Solicitor's office and the Department of Justice with representatives thereof (Donald Redd of Justice and Harold Ranquist of Interior) making a field inspection thereon during the week of October 26, 1970. If this case is handled properly, it is entirely possible that at long last we will be able to go to court against the illegal taking of water in the upper Gila River valleys in violation of the rights appurtenant to the San Carlos Indian Irrigation Project.

There is need for case preparation in the J. Ed Smith wel case if the larger objective is to be obtained. We have the immediate need for $25,000 for the entering into of agreements with W. S. Gookin and Associates, an engineering consulting firm located in Phoenix, and with the U.S. Geological Survey. The Solicitor's office and Justice are actively forwarding our interests in the J. Ed Smith well case and the time frame is such that this will move forward quickly and rapidly. Further, we need to develop our testimony in connection with it which will be helpful in future litigation—all within a relatively short period of time. To that end we need the immediate financing mentioned. A memorandum to the Area Director from San Carlos Irrigation Project Engineer Marvin D. Young, dated November 12, 1970, with attachments, is enclosed in support of this memorandum and for your information.

The 1971 fiscal year funds allocated to this office which might be used for part or all of this are entirely allocated to needed and required surveys and plans. I would point out to the office that these funds are subject to more than the normal financial strain by reason of activities relative to the Pyramid Lake Indians of

Nevada. We are having to finance 25.1% of the cost of the studies of the Pyramid Lake Task Force, and of the Operating Criteria and Procedures Committee of the Truckee-Carson Rivers. Also, we are engaged in formulating the Federal position on the California-Nevada interstate compact. All of these activities include travel and per diem costs for personnel of the Nevada Agency and the Area Office.

Your early and favorable consideration of our request for the $25,000 allocation is greatly appreciated.

GEORGE W. HEDDEN.

OCTOBER 27, 1970.

Memorandum to: Commissioner of Indian Affairs. Attention: Acting Director, Economic Development.
From: Assistant Area Director (Economic Development).
Subject: Program priorities—Economic Development.

Relative to the above subject we have separated the priorities by titles and boundaries and by water rights. In our discussion of the problems you will note that several actions that would go far toward resolution are pending in your office or in the Department. These items for titles and boundaries are:

1. The Fort Mojave California Swamplands case.
2. The Fort Apache matter referred to.
3. The Walker River matter referred to.
4. The Uintah and Ouray matter.

Actions in Washington for water rights are:

1. "Westwide" or Western United States Water Plan Study.
2. Pyramid Lake.
3. Fallon Reservation.
4. Salt River Agreement—for Fort Apache, San Carlos and Camp Verde Reservations.

We have mentioned various requests for additional land. Some requests for lands are in the stage of proposed legislation. Expeditious handling on the proposed legislation that is pending in your office or in the Department for the Payson Band-Yavapai Apache and for the Nevada groups would be most helpful. A legislative proposal needing particular attention is that relating to the portionment of the 1882 Executive Order Reservation outside of the Hopi Reservation.

Priorities as to titles and boundaries are:

1. Fort Mojave and Quechan—Equal priority
2. Colorado River
3. Cocopah
4. Salt River
5. Payson Band-Yavapai Apache
6. Fort Apache
7. San Carolos Mineral Strip
8. Uintah and Ouray
9. Walker River
10. Papago
11. Miscellaneous

Priorities as to water rights are:

1. "Westside" or Western United States Water Plan Study
2. Pyramid Lake
3. Fallon Reservation
4. Salt River Agreement
5. San Xavier
6. Colorado River Valley
7. Central Arizona Project
8. Walker River Reservation

The above priorities are only advisory. Each of the problems has a high priority. Many of the problems are of long duration. Progress towards solution or resolving them should be pursued aggressively without reference to priority. Priorities, too, may change very quickly, particularly where cases may be in litigation or when litigation is introduced.

The Phoenix Area has been and is working dilegently for a soluation of these problems. Very readily $100,000 of additional funds could be committed to work in this Area in the current fiscal year. All assistance from Washington, both of personnel and funds, is gratefully appreciated.

Enclosed are statements on the individual problems.

GEORGE W. HEDDEN.

Titles and Boundaries

PRIORITY 1.—FORT MOJAVE

There are numerous boundary and title problems caused by the natural changes in the Colorado River and by channelization by the Bureau of Reclamation. Complicating the problems are the claims of California and Arizona to the abandoned bed of the river (last natural river location prior to channelization). Further complicating the problems are the actions of the Bureau of Reclamation—purchases of title or other use rights in lands claimed by the Tribe and unauthorized uses of land of the Tribe—subsequent to channelization. *Because of the conflicting claims of the Tribe and the United States* (which was demonstrated in the original *Sherrill* v. *McShan* (Goat Island) case, Don Maynard of your staff has intimate knowledge of this case), *the Tribe, its attorney, and we have not that the Solicitor's office or the Department of Justice would be in a position to advocate the Tribe's case, and have, therefore, been most reluctant to seek assistance from these sources.* The result is that the Tribe is spending a large portion of its limited income (of less than $80,000 this year) on attorney's fees defending its claims. With this background, we turn to the specific problem areas on Fort Mojave; it should be borne in mind that the problems are interrelated and should not be separated.

(*a*) *California Swampland case.*—The claim of California to lands under the Swampland Act is now before the special Hearing Examiner who will make recommendations to the Secretary for decision. In addition to the State's claim, there is an underlying dispute between the Tribe and the Bureau of Land Management. Indications are that the Examiner may resolve the matter of the State's claim, but not make recommendations on the dispute between the Tribe and the Bureau of Land Management. Should this occur, it will be necessary to prepare for argument before the Secretary on this issue. Practically all of the work has been done if such argument is necessary and preparation entailed will only require services of Mr. Veeder for perhaps ten days to review material with our office and with the Tribal Attorney.

(*b*) *Mojave* v. *William LaFollette.*—This case involves substantially the same lands as were in the original *Sherrill* v. *McSan* (Goat Island) case. Records, maps, etc., have been gathered—there is a need for review and analysis of material with Mr. Veeder and the Tribal Attorney.

(*c*) The *Mojave* v. *William LaFollette* land is in the checkerboard area of the Reservation and, as mentioned, it should not be considered in isolation from the other identical problems. There are two cases presently in State Court (*River Farms* v. *Fountain* and *Amtitle and Trust* v. *Werner*) where we have asked that the Justice Department file a Suggestion of Interest. The Tribe desires to try its case (*Mojave* v. *LaFollette*) rather than have these cases go to final judgment. Background material we have in these and other areas in the checkerboard portion are of necessity being treated in connection with our work on *Mojave* v. *LaFollette.*

(*d*) *Fort Mojave.*—The channelization work of the Bureau of Reclamation in the Fort Mojave area has irreparably damaged the land in many instances. The Bureau of Reclamation does not have a valid right-of-way in the checkerboard area of the Reservation. Liability for damages to some of the land (Havasu Fish and Wildlife Refuge) has been found by the Claims Commission. This applied, of course, only to actions resulting in damage that were taken prior to the date of the Claims Commission Act. Actions which have been taken by the Bureau of Reclamation subsequent to channelization have effectively deprived the Mojaves of access for their lands to the Colorado River. The Mojaves do not want to be paid money for these damages. They would instead want rectification that would benefit the remaining lands. Hence, we need to develop for them the data relating to the extent of damages caused by the Bureau of Reclamation works. This item also is inextricably joined to the other problems of Fort Mojave.

(*e*) *Intermediate Area.*—The intermediate area presents another problem as to whether there are non-Indian lands between the present river and the Tribal lands. Material has been gathered, but the necessary field work and analysis has been deferred.

PRIORITY 1.—QUECHAN

The Quechan Tribe has asked the Bureau to support its position that the 1893 Agreement by which the Reservation lands were ceded to the United States is invalid because of fraud, duress, and coercion, and for the reason that there was a failure of consideration. Congressman Tunney has introduced bills in the last several Congresses that would "restore" certain of the lands to the Quechans.

The Quechan case before the Indian Claims Commission alleges that there was a taking of the land and, of course, asks money payment therefor. The records, maps and other materials have been gathered. There is need now for review and analysis of this material and performance of the field work and further research that may be indicated by the review. The review and analysis has been started during Mr. Veeder's trip here during the current week of October 26, 1970.

PRIORITY 2.—COLORADO RIVER RESERVATION

(*a*) In the Calloway Survey area including the Ninth Avenue and Olive Lake Cut-off areas, there is still initial research work needed in State, county and Federal office records with possibly some work required in the National Archives. Simultaneously, the task would require surveys and river movement studies. Funds for contracting with the U.S. Geological Survey for studies also would be required.

(*b*) The Colorado River Tribes also has asked for legislation to return the La Paz mineral area in the southeast corner of the Reservation. Practically no background work has been done on this.

(*c*) There is need for correction of the description of the Reservation from Monument Peak to the top of Riverside Mountain. An error occurred when the "top" of Riverside Mountain was determined in an erroneous position.

PRIORITY 3.—COCOPAH

We have previously informed you of the desires of the Cocopah Indians for additional lands. While a part of the land desired would be granted, there is an unresolved question as to how much of the land requested might belong to the Tribe by accretion. Considerable work has been done by California Indian Legal Services for the Tribe, but field work by engineers knowledgeable in river movement and necessary survey crew support is required. Attorneys Grabill, Rosenfelt and Pelcyger, of the Native American Rights Fund, October 9, 1970, filed a complaint for injunction and declaratory relief for the Cocopah Tribe against the Secretary for approximately a thousand acres of accreted land. In view of the work currently in progress the introduction of the suit may be premature and can well "muddy the waters".

PRIORITY 4.—SALT RIVER

The south boundary of the Salt River Reservation was determined by the Secretary to be the middle of the south channel of the south boundary of the Salt River. The matter of the location on the ground of this boundary is subject to dispute between the Bureau of Land Management on the one hand and this Bureau and the Tribe on the other. Our most recent information is that Deputy Assistant Secretary Orme Lewis, Jr., would instruct the Bureau of Land Management to locate the boundary on the basis of data furnished by this office (see the attached copy of Mr. Royal D. Marks' October 14 letter). There is need to locate and monument the south boundary to the north and east of the portion of the boundary that was determined by the Secretary and is proposed to be surveyed by the Bureau of Land Management.

MARKS & MARKS,
Phoenix, Ariz., October 14, 1970.

Mr. EDMUND MEGUAL,
President; Salt River First-Maricopa Community Council,
Scottsdale, Ariz.

DEAR EDMUND: I finally got through to Orme Lewis, Jr. on Monday, October 12, 1970, and told him that nothing further had occurred since my visit with him on September 10th. At that time he assured me that he was going to inform the local BLM office to proceed with the survey, particularly in Section 3 and issued the survey on the factual situation on the ground as put together by Jim Jones.

Mr Lewis informed me that he was out there on September 22nd and personally met with the director of BLM and went over the situation with him and instructed him to proceed with the survey as per the discussion as mentioned above. He was surprised that nothing further had been heard from Bill and told me he would call the director as soon as he hung up from talking with us.

* * * * * * *

Sincerely,

ROYAL D. MARKS.

PRORITY 5.—PAYSON BAND OF YAVAPAI-APACHE

On September 3, 1970, the Department submitted a report on S. 696 (companion House Bill is HR 679) providing for the acquisition of a village site (not to exceed 85 acres) for the Payson Band of Yavapai-Apache Indians to be selected within the Tonto National Forest. In its report the Department suggests amending the bill to provide for the purchase of the land and deeding it to the Indians "without Federal recognition of the group as entitled to special Federal Indian services". The position of the Department has incurred the displeasure of the Indians. The Arizona Inter-Tribal Council passed a resolution with substantially the same language as in the draft copy attached. The very re ent National Congress of American Indians in its Alaska meeting passed a similar resolution.

Legislative bills have been before both the 90th and 91st Congress to provide a land base for the Payson Band of Yavapai-Apache. Enactment of legislation is needed and preferably reconciling the positions of the Indians and the Federal Government.

RESOLUTION

Whereas, Mr. Goldwater, Mr. Fannin, and Mr. Steiger introduced Bills S. 696 and H.R. 679 to authorize the acquisition of a village for the Payson Band of Yavapai-Apache Indians, the area consisting of 85 acres to be selected in the Tonto National Forest within Gila County, Arizona;

Whereas, the Bills were referred to the Committee on Interior and Insular Affairs;

Whereas, the Committee Chairman further referred to and requested the views of the Secretary of the Interior on S. 696, a bill "To provide for the acquisition of a village site for the Payson Band of Yavapai-Apache Indians";

Whereas, the Assistant Secretary of the Interior responded and requested several changes in the Bill, one change as follows: "In order to assist these Indian people in obtaining suitable homesites and to overcome potential health hazards from drainage toward the water supply for Payson, it is suggested that the Bill be amended to authorize that the land be purchased and deeded to the Indians without it becoming a Federally supervised Indian reservation, and without Federal recognition of the group as entitled to special Federal Indian Services. Congress enacted a Private Law 88–350 during the 88th Congress that donated land for the Yaqui Indians of Tucson who were in a somewhat comparable situation.";

Whereas, Assistant Secretary of the Interior Harrison Loesch wants termination for the Yavapai-Apache Band of Payson, and this is not what they want, nor is it in accord with President Nixon and Vice-President Agnew's announced policy. Said policy is stated by the President in these words:

"Because *termination is morally and legally unacceptable*, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self sufficiency among Indian groups, I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate, and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83d Congress . . . such a resolution would reaffirm for the Legislative branch—*as I hereby affirm for the Executive branch—that the historic relationship between the Federal government and the Indian communities cannot be abridged without the consent of the Indians.*" (Emphasis added.)

Whereas, the passage of the Bills as originally stated would help the Payson Band secure Mutual Help Housing, and Public Health would provide sanitation and water systems for the Payson Band of Yavapai-Apache Indians; Now therefore be it

Resolved, That the National Congress of American Indians request the Congressional Committee on Interior and Insular Affairs to recommend that no change in the Bill is needed and a quick passage is in order for H.R. 679 as originally introduced; be it further

Resolved, That it is the consensus of this convention of the National Congress of American Indians that the Administration should make its actions consistent with its rhetoric; that those administrators who do not agree with the President, or do not understand what he is saying, should be removed from office before irreparable breach of confidence on the part of the Indians in the Administration occurs.

CERTIFICATION

The foregoing Resolution was duly adopted by the Arizona Inter-Tribal Council in legal session on October 17, 1970.

DONALD ANTONE, Sr.,
President.

PRIORITY 6.—FORT APACHE

The White Mountain Apache Tribe, the Agency, the Forest Service, and the Bureau of Land Management have worked cooperatively in resurveying and remonumenting portions of the Reservation boundary. Our letter of June 3, 1970, asked that you expedite action by BLM in Washington on approval of the notes. of this work. Resolutions 70–102 and 70–103 referring to this matter are enclosed.

As soon as notes are approved action will be needed to proceed against numerous trespassers.

RESOLUTION NO. 70–102

RESOLUTION OF THE WHITE MOUNTAIN TRIBE OF THE FORT APACHE INDIAN RESERVATION

Whereas, the White Mountain Apache Tribe, the Bureau of Indian Affairs, the U.S. Forest Service and the U.S. Bureau of Land Management have recently completed a remonumentation and retracement program on the east, west and north boundaries of the Fort Apache Indian Reservation, and

Whereas, there are major trespass problems which currently exist along the north boundary from lands that are now in private ownershlp, and

Whereas, the U.S. Forest Scrvice has designated a large area of Forest Lands adjacent to the Reservation for exchange and most of said lands are currently in escrow awaiting final disposition from the U.S. Forest Service, and

Whereas, the "Rim Road" meanders onto the Reservation and the existing fence does not delineate the true boundary which will cause untold additional trespass problems once the Forest Service exchange lands go to private ownership, and

Whereas, the U.S. Forest Service has agreed to include an easement to the exchange lands on which to relocate the Rim Road where possible, and

Whereas, on this date a duly constituted quorum of the Tribal Council did physically inspect the entire area of the north boundary in question.

Be it resolved, That the Tribal Council concurs with the Bureau of Indian Affairs recommendations to:

1. Assist with the physical relocation of the "Rim Road" to locations north of the actual boundary from the west end of the White Mountain Country Club to the 56-mile corner of the North Boundary, except:

2. To allow the Rim Road to remain on the Reservation at two locations within the area in 1 above namely:

(*a*) Where the boundary crosses the Rim Road in the vicinity of Angle Point 295 to where it recrosses the boundary in the vicinity of Angle Point 297.

(*b*) Where the boundary crosses the Rim Road between Angle Point 312 and 313 to the point where it recrosses the boundary in the vicinity of the 52 mile corner.

Provided that cattleguards are constructed at the points where the Rim Road comes onto and leaves the Reservation (a total of four cattleguards) and the boundary is fenced north of the Rim Road.

Be it further resolved, That the Bureau of Indian Affairs Branch of Land Operations is authorized to expend Tribal funds as already budgeted in Section 1—Boundary fence account of the Central Tribe budget to assist with the relocation and fencing of critical sections of the boundary, and

Be it further resolved, That the Bureau of Indian Affars Branch of Land Operations is authorized to expend funds from the above mentioned tribal account to obtain the services of a registered engineer or survey to establish the boundary line between established corners and angle points as determined to be necessray for the immediate solution of existing problems.

The foregoing resolution was on June 11, 1970 duly adopted by a vote of 7 for and 0 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1(i) of the Amended Constitution and By-Laws of the Tribe, ratified by the Tribe June 27, 1958 and approved

by the Secretary of the Interior on May 29, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

_____ _____,
Chairman of the Tribal Council.

_____ _____,
Secretary of the Tribal Council.

RESOLUTION NO. 70–103

RESOLUTION OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION

Whereas, the White Mountain Apache Tribal Council has this date physically inspected the north boundary of the Fort Apache Indian Reservation and observed the many cases of trespass that exist from the 45 mile corner to the 55½ mile corner, and

Whereas, the Council is definitely concerned about the problems associated with private encroachment onto the Fort Apache Indian Reservation, and

Whereas, the Council is aware that the Bureau of Land Management has remonumented most corners and angle points of the north boundary during 1966, 1968 and 1969 and retracement of all remaining corners was completed June 11, 1970.

Be it resolved, That the Tribal Council hereby requests all assistance possible from the Bureau of Indian Affairs and the Bureau of Land Management to expedite approval of the north boundary field notes from the 45 to the 55½ mile corner, said field work having been performed during 1968 and 1969, and the recently completed retracement field notes for the same area of the north boundary, and

Be it further resolved, That it is imperative that the White Mountain Apache Tribe make proper disposition of the existing trespass cases and avoid additional trespass problems and to do so it is essential that the field notes be obtained so that the boundary line can be accurately defined.

The foregoing resolution was on June 11, 1970 duly adopted by a vote of 7 for and 0 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1(i) of the Amended Constitution and By-Laws of the Tribe, ratified by the Tribe June 27, 1958 and approved by the Secretary of the Interior on May 29, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

_____ _____,
Chairman of the Tribal Council.

_____ _____,
Acting Secretary of the Tribal Council.

PRIORITY 7.—SAN CARLOS MINERAL STRIP

The San Carlos Mineral Strip was restored to the San Carlos Apache Tribe by an order of the Secretary on January 24, 1969. The lands were previously ceded for purposes of disposal under the mineral land laws only.

(*a*) However, the State of Arizona claims ownership of certain of the lands under State school and other types of grants. There is need for a complete title search of these lands for the purpose of determining whether litigation should be instituted to recover the lands for the San Carlos Tribe.

(*b*) In the Mineral Strip 11,641.47 acres are included in the Coronado National Forest. Overtures should be initiated in the near future for this land being restored to the jurdisdiction of the San Carlos Tribe.

PRIORITY 8.—UINTAH AND OURAY

Our memorandum of September 9, 1970, Subject: Amendment of Executive Order No. 5327 to delete lands in Uintah and Ouray Reservation, (copy attached for ready reference) requested amendment of Executive Order No. 5327 to delete lands in which the Ute Tribe has a beneficial interest. Those lands, plus others, on the reservation have had mining claims filed on them. Most of such claims are probably invalid. The Bureau of Land Management is currently engaged in an oil shale reserve review project on a rotational basis in the States of Utah and Colorado. This work is good, but will be slow in developing results in terms of

the needs of the Ute Tribe and may fall short by itself in clarifying all claims. We need to contract with the Bureau of Land Management to expedite a study on the Uintah and Ouray Reservation to determine what claims have been filed and further action to invalidate as many as possible. We do not have an estimate of total cost, but based on similar work elsewhere a minimum of 35 to 40 thousand dollars will be needed.

Memorandum to: Commissioner of Indian Affairs.
From: Area Director.
Subject: Amendment of Executive Order No. 5327 to delete lands in Uintah and Ouray Reservation.

The act of May 27, 1902 (32 Stat. 245, 263), made provision for the allotment of lands to the Uintah and White River Tribes of Ute Indians. On October 1, 1903 all lands on the reservation not allotted were restored to the public domain. Homesteaders were to pay $1.25 per acre for land entered, with the proceeds, after reimbursement to the United States of expenses, to be used for the benefit of the Indians. Consequently, beneficial title to the restored lands remained in the Indians under the doctrine set out in Ash Sheep Co., v. United States (252 U.S. 159).

Executive Order No. 5327, dated April 15, 1930, withdrew from disposal all deposits of oil shale and the lands containing said deposits owned by the United States. Part of the lands withdrawn were identified at the time of the order; the Geological Survey has subsequently from time to time identified additional lands affected, including a 1967 identification of lands within the Uintah and Ouray Reservation.

Secretarial Order of August 25, 1945, restored to Tribal ownership all undisposed of opened lands of the Uintah and Ouray Reservation pursuant to the Indian Reclamation Act. The Regional Solicitor, Salt Lake City, has conveyed his oplnion that the 1945 restoration did not include land within the reservation withdrawn under Executive Order 5327.

In view of the fact that the Indians still hold beneficial title to these lands, the Executive Order should be amended to delete lands within the reservation.

For your information we are enclosing memorandum of August 19 from the Superintendent, with copies of Business Committee Resolution No. 78–281 attached, as well as copies of a July 23 letter from the Chairman. Copies of memorandum mentioned in the Superintendent's memorandum are also enclosed.

We recommend the amendment of Executive Order No. 5327 to delete all lands located within the Uintah and Ouray Reservation.

GEORGE W. HEDDEN,
Assistant Area Director.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
UINTAH AND OURAY AGENCY,
Fort Duchesne, Utah, August 13, 1970.

Memorandum to: Phoenix Area Office. Attention: George W. Hedden, Assistant Area Director.
From: Superintendent, Uintah and Ouray Agency.
Subject: Revocation of Executive Order No. 5327.

There are enclosed two copies of Uintah and Ouray Tribal Business Committee Resolution No. 70–221 dated July 13, 1970, requesting that Executive Order No. 5327 dated April 15, 1930, withdrawing lands for oil shale, be revoked insofar as trust Indian lands of the Uintah and Ouray Reservation, both surface and minerals, are concerned. Also enclosed are copies of a letter from the Chairman of the Business Committee of the Ute Tribe.

The Regional Solicitor's opinion referred to is his memorandum dated May 14, 1970 to the State Director, Bureau of Land Management. Copies of it were previously furnished you with copies of our memorandum to the State Director dated June 1 1970. We do not have a copy of the "opinion of the Solicitor's Office in. Washington." We believe this refers to an exchange of interoffice memoranda between the Salt Lake City and Washington offices of the Solicitor.

We heartily endorse the Tribe's request and strongly recommend that action be taken to initiate revocation of the Executive Order and any subsequent ones that contain lands owned by the Ute Indian Tribe. We understand that there is precedent for a partial revocation of the orders insofar as lands owned by the State of Utah in the Salt Lake meridian are concerned.

STANLEY D. LYMAN.

THE UTE INDIAN TRIBE,
Fort Duchesne, Utah, July 28, 1970.

Superintendent STANLEY D. LYMAN,
Uintah and Ouray Agency,
Fort Duchesne, Utah.

DEAR SUPERINTENDENT LYMAN: I am attaching signed copies of resolution No 7–221, executed by the Uintah and Ouray Tribal Business Committee on July 13, 1970.

The resolution requests that Executive Order No. 5327 dated April 15, 1930 be recinded insofar as it covers lands and minerals of the Indians of the Uintah and Ouray Reservation.

We feel the Order is in direct conflict with the Indian Reorganization Act, and inasmuch as the Regional Solicitors Office has given its opinion based on an opinion of the Solicitor's Office in Washington some four years ago that the lapsing of time is and will continue to seriously hamper the Tribe in the orderly development and administration of its lands.

We feel that immediate action should be taken by the Department to clear title to these Indian lands and minerals.

Sincerely,

FRANCIS WYASKET, *Chairman.*

RESOLUTION NO. 70–221—UINTAH AND OURAY AGENCY, FORT DUCHESNE, UTAH

Whereas, in the opinion of the Regional Solicitor dated the 14th day of May, 1970, the Executive Order No. 5327, dated the 15th day of April, 1930, withdrawing oil shale lands from the public domain, creates a cloud of the title to lands held by the United States of America in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation, and

Whereas, said cloud on the title has become a serious detriment to the orderly administration of tribal lands, and it is deemed in the best interest of the Ute Indian Tribe that said cloud on the title be removed, and

Whereas, said cloud may be removed by modifying said Executive Order No. 5327 by excepting therefrom all land and minerals held in trust by the United States of America for the Ute Indian Tribe: Now, therefore, be it

Resolved by the Uintah and Ouray Tribal Business Committee of the Ute Indian Tribe, that the President of the United States, Richard M. Nixon, and the Secretary of the Interior, Walter Hickel, are hereby requested to rescind said Executive Order No. 5327 as to all lands and minerals presently held in trust by the United States of America for the Ute Indian Tribe of the Utah and Ouray Reservation.

FRANCIS WYSAKET, *Chairman.*
HOMEY J. SECAKUKU, *Vice-Chairman.*
WILBUR BUCH,
IRENE C. CUCH,
CLIFFORD H. DUNCAN, *Members.*

PRIORITY 9.—WALKER RIVER

The Act of June 22, 1936 (49 Stat. 1806), authorized the addition of certain lands to the Walker River Indian Reservation in Nevada. Not all of the acreage authorized by this act was added to the Reservation. Walker Lake has receded by a slow and imperceptible process, and the exposed lake bed fronting Tribal lands belongs to the Tribe as held in an April 9, 1968 Solicitor's opinion. The matter of defining the relicted lands and public domain lands to be added under the 1936 Act has been the subject of a great deal of correspondence between our offices. The matter is presently before your office (or possibly the Department) as submitted by our May 4, 1970 memorandum. If the Assistant Secretary and the Solicitor's office are satisfied with the factual material most recently submitted, there will not be need for additional field work except for official surveys of the relicted area by the Bureau of Land Management. It appears at this point that the only need is for your office to seek expeditious handling of the matter by the Department.

PRIORITY 10.—PAPAGO

Several years ago the Bureau of Land Management found a number of mining claims on the Papago Reservation invalid. In this work some 500 mining claims

appeared to be valid on the face of them. There is need to re-examine these claims in detail in the field, prepare reports (including charts and exhibits for hearings), hold hearings, all with the view to reducing the number of claims to a minimum. Services of a qualified mining engineer would be required. Some local BLM officials believe the number of claims could be reduced substantially. An amount in excess of $25,000 would be required. We will contact the Bureau of Land Management and get current estimates of the costs it would charge for this work.

PRIORITY 11.—MISCELLANEOUS

Chemehuevi, Havasupai and Hualapai Reservations, and various Nevada Colonies have requests that additional lands be given to them. While these may not involve boundary and title problems, there is considerable amount of research that should be done into the background to show the moral and legal, as well as the economic, justification for the requests.

Water Problems

PRIORITY 1.—"WESTWIDE"

Pursuant to Public Law 90–537 the Bureau of Reclamation is instituting a study—The Western United States Water Plan—in the eleven western states. Mr. Charles P. Corke of the Washington Office presented the position of the Commissioner's office on the study at a general meeting of Federal and state agencies on September 30, 1970. On September 17, 1970, I reported to the Commissioner my concerns regarding the Westwide study. On October 19, 1970, I further expressed my concerns and recommended prompt action to appoint a person or persons representing the Indian interests to liaison with the Bureau of Reclamation at Denver on the study. Examination of the outline plan, attendance at the Denver September 30 and October 1 meetings and the discussions on the plan at the Pacific Southwest Field Committee meeting October 16, all confirm my concerns. At the end of the study in 1977, and quite possibly even at the termination of the first phase of the study in 1975, the allocations of water in the eleven western states will be so finalized that talk of or the actual initiation of an adjudication in behalf of any tribe or group of Indians under the Winter's Doctrine principles would be a fatuous action. Adjudication should be instituted promptly for all Indian water rights; further delay will forfeit the Indian rights. The work of a century should be performed within the next five years.

PRIORITY 2.—PYRAMID LAKE

The Pyramid Lake Indians' Pyramid Lake has a surface of 110,000 acres. The only decreed water right the Indians have is for approximately 30,000 acre feet for agricultural purposes, as and when the lands are prepared and ready for agriculture, under the 1944 Truckee River Decree. There is no allocation of water for the lake. The decree on the Truckee River in no way resolved any adjudication of Indian water rights in California in behalf of the Pyramid Lake Indians. In view of the conjunctive use of the water of the Carson and Truckee Rivers for the Newlands Irrigation Project, the Pyramid Lake Indians, also, have an interest in the outcome of the Alpine litigation instituted by the United States in 1925 to firm up its rights for the said irrigation project. The Indians intervened in that case and successively lost their position before the Federal District Court and the Court of Appeals, the latter decision being made very recently. The Indians now have instituted a complaint for injunction, mandamus and declaratory relief before the United States District Court for the District of Columbia, naming both the Secretary of the Interior and the Attorney General of the United States as defendants. as trustee for the Indians, the United States for long has had the responsibility of not only declaring that the Pyramid Lake Indians had a water right for Pyramid Lake but of giving that right definition. In the absence of the Federal Government's having done this, the water supply of Pyramid Lake for decades has been increasingly appropriated and used by others which practice is continuing in the present and into the future. The Bureau, in both Washington and in the field, has been and is now engaged in various efforts to obtain and protect the water supply for Pyramid Lake.

However, any gains made in behalf of Pyramid Lake at the present time are foreseen as being offset by demands on the supply. The projections for the long-term rate of recession for Pyramid Lake have never leveled off nor even slowed, but

will continue at the same downward rate. The States of California and Nevada since Congressional authorization in 1955 have been compacting the waters of Lake Tahoe, the Truckee, Carson and Walker Rivers. On September 19, 1970, the Governor of California approved Assembly Bill No. 1350 which it is anticipated will become the official Nevada version early in this winter's legislative session. The Federal Government at the present time is proceeding with the development of a Federal position in regard to the compact. As one of the four members of the committee, on that committee my charge is for the development of the Government's position which thereby removes the possibility of my being the complete advocate for the Indians. Actually the water of the Nevada systems being compacted is simply the division of unused waters between the two states which waters otherwise would be free to flow unimpeded into Pyramid Lake and Walker Lake. Parenthetically it should be stated I see no vestige of interest—California, Nevada or Federal—for maintaining Walker Lake. Adjudication of water for Pyramid Lake is sorely needed.

PRIORITY 3.—FALLON INDIAN RESERVATION

Subsequent to the authorization of the Newlands Irrigation Project in 1902 allottees of the Fallon Indian Reservation were persuaded to exchange 160-acre public domain allotments for 10-acre irrigated allotments within the project and with paid-up irrigation construction and operation and maintenance charges. The exchange program was never fully completed. There remains to be made available to the Fallon Indians 1600 acres of irrigated lands. These are available within a total block of 2640 acres of public domain under withdrawal by the Bureau of Reclamation and the Bureau of Sport Fisheries and Wildlife. The Fallon Tribal Council on December 13, 1966, in its Resolution No. 7–67, requested the addition of the lands to the reservation. The request of the Tribal Council was transmitted to the Commissioner by this office on January 20, 1967, with the request that the lands be withdrawn. Nothing definitively yet has come of the matter. The Tribal Council on September 9, 1969, by its Resolution No. 70–F–3 requested the assistance of the Superintendent and Congressional delegation. On October 15, 1969, the Washington Office wrote Senator Bible stating in part that the Bureau has "prepared a request for withdrawal of these lands in aid of legislation." Similar letters were sent to Senator Cannon on October 17, 1969, and to Congressman Baring on November 6, 1969. In the letters the Washington Office admitted to the Congressional delegation the loss of the record. In response thereto the Area Office re-submitted the entire file. The last submission to the Commissioner by this office was on July 7, 1970, in which we requested withdrawal of the lands in aid of legislation and submitted information pertinent thereto.

One of the problems that is distasteful to the Bureau of Indian Affairs is that if the Fallon Indians have 1600 acres more of land irrigated, the draft on the Truckee River will be increased by the amount of water to irrigate such acreage and in turn will further decrease the inflow to Pyramid Lake. We are advocates for the Pyramid Lake Indians in having sufficient water to maintain their lake but there are two reason why the addition of irrigated lands should be made for the Fallon Indains: (1) This inequity stems back to the early years of the present century and the Fallon Indians have the right to expect the Government to honor its agreement to them; (2) The matter of whether the draft on the Truckee River is increased for the Fallon Indians or not becomes academic in considering that the Bureau of Reclamation and the Truckee-Carson Irrigation District is enlarging the project's irrigated acres to 74,500 irrigated acres. Simply stated, if the Fallon Indians do not obtain this increase of irrigated land in the amount of 1600 acres other parties will enlarge their acreages to absorb the 1600 acres and the increased draft on the Truckee River will still take place. The decision by the Washington Office in favor of the request of the Fallon Indians may be distasteful but, nevertheless, needs to be made.

PRIORITY 4.—SALT RIVER AGREEMENT

On November 25, 1969, the Area Office forwarded to the Commissioner an agreement for use of water from the Salt River system on the Fort Apache, San Carlos, and Camp Verde Indian Reservations. Since that time there has been the circulation of an interrogatory from the Commissioner's office to the Solicitor's office through the office of the Assistant Secretary of the Interior, Public Land Management, and back again to the Commissioner's office. The agreement, when approved by the Secretary and when further confirmed by a court decree

would finalize the use of water for the Indians as against the interests of the Salt River project at a much higher figure than the Indians would have received had their rights been adjudicated in the *Arizona* v. *California* proceedings. The agreement also would avert suit from the Salt River Project interests that had been threatened since at least the Hawley Lake incident of 1957. In response to the court's action dismissing the case in 1966 for the lack of indispensable parties, the project was actually preparing for litigation with the inclusion of such parties. In the summer of 1968 there were negotiations by the representatives of the Salt River Project and the three Indian tribes. In the fall of that year the three tribes each approved separate resolutions approving the outcome of the negotiations as expressed in a memorandum of understanding. Following the endorsements of the memorandum of understanding the attorneys developed language for an agreement. The agreement in turn was approved by the three tribal councils by separate resolutions in the fall of 1969.

The requests of the three tribes for a solution of their water problems is awaiting action in Washington. The agreement needs to be made final. It is very likely that with the passage of time the favorable position of the tribes under the agreement will be eroded by such things as the increasing needs of the valley area surrounding Phoenix with its burgeoning population and the effect of the Westwide or other studies that will fix the allocaton of water for future use.

PRIORITY 5.—SAN XAVIER

Pursuant to Secretary Hickel's letter of August 29, 1970, to Chairman Segundo of the Papago Tribal Council, the Office of the Solicitor and the Bureau of Indian Affairs are making a joint investigation of the continuing decline of groundwater on the San Xavier Reservation. The elevation of groundwater has been declining since the turn of the century. Causes of decline on and in the vicinity of the San Xavier Reservation are:

1. Agricultural pumpage in the Sahuarita area.
2. M & I pumpage by the City of Tucson by a series of wells along the eastern and nothern boundaries of the reservation. The City's pumpage has increased greatly in the last decade.
3. Mine pumpage by four mining companies in the Sierrita Mountain area on the south side of the reservation. The companies have purchased between 1500 and 2000 acres of farm land; have ceased agricultural production and are using the water rights appurtenant to the acreage for the pumping of water for mining operations. The water table on the south side of the reservation in the five-year period, 1965 to 1970, has dropped approximately 50 feet.

The effect on the pumpage by the City of Tucson has caused water to flow off the reservation to the east to Tucson city wells and by the mines to the south. Currently the investigation is underway; as yet no recommendation has been made as to what proceedings, if any, should be initiated.

PRIORITY 6.—COLORADO RIVER WATER—LOWER COLORADO RIVER VALLEY

Land title and boundary problems of the reservations under the Colorado River Agency, Parker, Arizona, are being worked on by a combination of personnel, including the several tribal councils, tribal attorneys, agency, area and Washington personnel. The reservations involved are, proceeding from south to north: Yuma, Cocopah, Colorado River, Chemehuevi, and Fort Mojave Indian Reservations. The cases are in various stages of progress. In the proceedings of *Arizona* v. *California* it will be recalled that the Hearing Master did not consider needs of water for those lands on which Indian title was in dispute in either Arizona or California. The result is that as Indian title is established (such as those lands east of the Benson line in California for the Colorado River Tribes) there needs to be action for the allocation of water for these Indian lands. In view of any such allocation having to come from that of the particular state in which the land is located, protests are to be anticipated from both Arizona and California. Fortunately the Supreme Court has not yet finalized its decree in *Arizona* v. *California*. The Tribes and the Bureau in the field, it is expected, will move very promptly for an allocation of water for all such lands.

PRIORITY 7.—CENTRAL ARIZONA PROJECT

Submissions for Central Arizona Project water in areas of Bureau of Indian Affairs' interest total 903,158 acre feet; thus,

Fort McDowell Reservation—30,000 acre feet;

Salt River Reservation—110,000 acre feet;
Papago Reservation—8,390 acre feet;
Ak-Chin Reservation—78,768 acre feet;
San Carlos Irrigation Project, inclusive of lands within the San Carlos Irrigation & Drainage District and Gila River Reservation—240,000 acre feet; and
Gila River Reservation, outside of the San Carlos Irrigation Project—436,000 acre feet.

The water of the Central Arizona Project is greatly oversubscribed. The purpose of the Bureau as proceedings advance for allocation of Central Arizona Project water should be to advocate as much as possible of the above waters for Indian interests.

PRIORITY 8.—WALKER RIVER RESERVATION

In the case of Walker River by Decree C–125, as filed April 15, 1936, and amended April 24, 1940, the Indians have an allocation of 26.25 c.f.s. for a period of 180 days annually for the irrigation of 2100 acres of land with a priority date of November 29, 1859. The decree did not describe specifically the 2100 acres. The Federal Government originally had based its position for the Indians requesting water for an irrigated area of approximately 11,000 acres. The 1936 finding of the District Court was severe on the Indians with an improvement of their position in 1940 following action of the Court of Appeals. The amount of acreage and the water provided are still greatly less than those requested by the Federal Government. In 1940 and the years subsequent thereto, it was considered that the Walker River decree reduced the effectiveness of the Winter's Doctrine. It was not until 1963 with the issuance of the decree in the proceedings of *Arizona* v. *California* that the principles of the Winter's Doctrine were given solidity and even enlarged upon. Since the decree in *Arizona* v. *California* there has been speculation within the Office of the Solicitor and the Bureau of Indian Affairs that Decree C–125 on the Walker River should be reopened for the obtaining of more water for the Walker River Indians.

Our current efforts in formulating a Federal Government's position on the Joint California-Nevada Interstate Compact, if they become a part of the finalized compact, will provide approximately the same amount of water as the Government would have obtained under the Government's brief in the initial Walker River proceedings. However, as embodied in California Assembly Bill No. 1350, the water, in addition to that by Decree C–125, has the very late priority date of 1933. We are endeavoring to make that a good priority date as against future construction of storage and the recognition of presently undecreed water uses. However, in reopening Decree C–125 the effort would be to have the priority date for all the water advanced to November 29, 1859.

SEPTEMBER 17, 1971.

1. *Parker power.*—The 1933 agreement between the Metropolitan Water District and the United States provided that 50% of the power generated would belong to the Colorado River Indian Reservation and the Gila or Parker-Gila Project with an ultimate capacity of 120,000 kw. The Colorado River Indian Tribe has a reality right to its share rather than being treated simply as a preferential customer. Since January 18, 1971, a meeting on the matter has been pending with the Assistant Secretary for Water and Power without his taking action to establish the time and place for meeting. On September 8 the Deputy Commissioner of the Bureau of Indian Affairs requested the Assistant Secretary, Public Land Management, to endeavor to convene a meeting for the resolution of the problems at an early date.

2. *Uintah and Ouray oil shale withdrawal revocation.*—It is our understanding that there is general agreement withing the Department as to approval of the revocation. In the recent initial round on the matter there were proposed changes in language and the matter is now in its second round. The approval of the revocation should not be materially delayed by reason of the semantics.

3. *Pyramid Lake.*—For five years under the Operating Criteria Program for the management of waters of the Truckee and Carson Rivers the Department has been engaged in endeavoring to provide more flow of water in the Truckee River to Pyramid Lake to maintain its elevation and volume. Any water that is conserved in the stream by the Department for delivery to Pyramid Lake is open to water right application in either California or Nevada. In California the Water Rights Board and in Nevada the State Engineer with perfect propriety

can approve such applications. The Department needs to move promptly to assure that any waters that are conserved for Pyramid Lake will arrive at their proper destination.

4. *Pyramid Lake.*—At least as far back as the Secretary's Action Program Report of 1964, it has been recognized that if the Pyramid Lake Indians are to have proper volumes of water for preservation of Pyramid Lake and the Nation is to enjoy that heritage, an adjudication of the water rights in behalf of the Indians for that purpose is needed. Such adjudication is direly needed at the present time and actions on the finalization of the Alpine Case and the California-Nevada Interstate Compact should be held in abeyance until it is finalized.

5. The *Salt River Water Agreement* now before the Department involving three Tribes and the Salt River Valley Water Users Association should be approved or the field be instructed as to how to amend the same for the purpose of accomplishing its objectives.

6. *Winter's Doctrine.*—We believe there is a reserved right under the Winter's Doctrine for water for recreation, municipal and industrial purposes in addition to the reservation of water for irrigation. It is recommended that the possibilities be reviewed and a case selected on which to try the issues.

7. *California's Swamplands Application.*—A decision is needed to confirm the findings of the Hearing Examiner on the application of California under the Swamplands Act as to those lands which have been considered by the Fort Mojave Tribe and the Bureau of Indian Affairs as part of the Hay and Wood Reserve of the Fort Mojave Reservation.

8. *Fort Mojave Hay and Wood Reserve.*—Immediately following the preceding decision the Wheeler Survey should be approved as the west boundary line of the Hay and Wood Reserve on the Fort Mojave Reservation.

9. *Colorado River Cutoffs.*—There should be an early decision in the Department and the Department of Justice should be alerted of the intenion of Interior to proceed on the determination that the Ninth Avenue and Olive Lake Cutoff areas now on the west side of the Colorado River are parts of the Colorado River Reservation. This action is particularly needful in view of the statute of limitations codified as 28 U.S.C., Section 2415.

10. *Finalization of the south boundary of the Salt River Reservation.*—All material on this subject matter has been before the Cadastral Engineer of the Bureau of Land Management since July 1971 for his review, analysis and recommedndation. An early affirmative decision is needed consonant with the views of this office.

11. *Examination of water decrees.*—Considering the principles confirmed in the *Arizona* v. *California* Decree an examination should be made of certaiu existing water decrees for the purpose of determining the advisability of reopening such respective decrees in an effort to obtain more water for the Indians. Decrees which we would recommend for such examination are those pertaining to the Duck Valley, Fort McDowell and Salt River Reservations, Globe Equity-59 of the Gila River Reservation and particulary Decree C–125 of the Walker River Reservation.

12. *Fort Apache survey.*—The field notes for remonumentation of the north boundary of the Fort Apache Reservation have been before the Bureau of Land Management for some time. The field notes need to be approved promptly for the finalization of the boundary so that we can move to resolve the problems of present trespass and to deter future additional instances of trespass.

13. *Cocopah.*—For the benefit of the Cocopahs, Solicitor's Opinion M–36275 of April 15, 1955, should be reversed on the accretion of lands to Section 30.

14. *San Carlos Mineral Strip.*—Initiation of action with the Department of Agriculture looking to the restoration to the San Carlos Tribe of 11641.47 acres of land withdrawn from the Mineral Strip for the former Crook, now the Coronado National Forest.

15. *Lake Havasu Taking.*—A determination for both the Chemehuevi and Fort Mojave Tribes that the lands taken for Lake Gavasu only go to the edge of the pool. It is our position that the Secretary never did in fact take all the lands considered designated; furthermore, that an appraisal report is not a designation instrument and finally that designation is currently needed as to the area actually taken.

16. *Game Management.*—The Opinion M–36813 of March 29, 1971, in our opinion is deleterious to the position of the Utes and other Indians in the management of game and should be reviewed for the purpose of obtaining a reversal. If needful, we will submit a more complete statement of our position thereon.

17. *Application of Arizona v. California Decree.*—Secretarial Order of January 17, 1969, cleared title to certain lands on the west side of the Colorado River placing the same in trust for the Colorado River Tribes. In the *Arizona* v. *California* proceedings the quantities of water were not specified for those lands claimed by the Indians where the title was not clear. Additional areas also need clarification of title as to the Indian claims. Should the Supreme Court be approached on a piecemeal basis for the obtaining of water rights for such lands or should no approach be made until title has been clarified in all cases? If the decision is to proceed on a piecemeal basis, and indeed we do need a water entitlement currently for the lands east of the Benson Line, then this matter should be presented to the Court.

18. *Interpretation of Arizona v. California Decree.*—Clarification of the problems pertaining to water decreed pursuant to *Arizona* v. *California* as to moving water from the agricultural acreage for use on other acreage within the contiguous reservation and of changing use from an agricultural use to another.

19. *Hualapai North Boundary.*—A Solicitor's opinion is needed that the north boundary of the Hualapai Reservation is the center of the Colorado River rather than the south bank thereof. The National Park Service espouses the latter position. The former position has been confirmed by action of the Indian Claims Commission.

20. *San Xavier.*—At San Xavier it is our position that there has been a mining of water by the City of Tucson for use on non-overlying lands. Two actions are indicated: one is to cause the City to cease and desist and two, particularly pertinent in view of 28 U.S.C., Section 2415, the obtaining of damages against the City for the water that has been taken. Similar actions should be considered against the mining operators taking water from the south side of the San Xavier Reservation. However, these have had a shorter history than the taking of water by the City of Tucson.

2. DOCUMENTS RELATING TO PROPOSED "SALT RIVER" AGREEMENT

NOVEMBER 25, 1969.

Memorandum to: Commissioner of Indian Affairs.
From: Assistant Area Director (Economic Development).
Subject: Agreement-use of water from Salt River system on the Fort Apache, San Carlos and Camp Verde Indian Reservations.

Since May 1968 there have been valiant efforts to resolve operating problems by the Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District on the one hand and the upstream Indian interests on the other hand without resort to major litigation to determine the exact water rights of the respective parties. The Indian interests involved are those of the White Mountain Apache Tribe, the Yavapai-Apache Indian Community and those of the San Carlos Apache Tribe for that portion of their reservation within the Salt River Drainage. The efforts have resulted in the agreement enclosed for your review and that of the Commissioner of Reclamation and your jointly presenting the same to the Solicitor's Office of the Department and of their further presenting the agreement to the Department of Justice. The agreement, you will note, is not dated and is not signed at the present time. All of the parties in interest by appropriate resolution have stated their willingness to execute the agreement when it has been declared satisfactory by the Department and the Department of Justice. The agreement at this stage has not been signed to the end that should either the Department or the Department of Justice require a change in language it will be the easier to facilitate.

The original and three copies of the letter are forwarded for use by the Bureaus, the Solicitor's Office, and the Department of Justice; attached to each are copies of the following:

1. Regional Solicitor, Los Angeles, Draft—dated July 17, 1969, as further revised by the Phoenix Area Office, November 18, 1969.
2. San Carlos Apache Tribal Council Resolution No. 69–35, dated September 2, 1969.
3. Resolution of the White Mountain Apache Tribal Council No. 69–131, dated September 5, 1969.
4. Resolution of the Salt River Valley Water Users', dated September 8, 1969.
5. Resolution of the Salt River Project Agricultural Improvement and Power District, dated September 8, 1969.
6. Camp Verde Yavapai-Apache Indian Community Resolution No. 10–69, dated October 11, 1969.
7. Resolution of the Salt River Valley Water Users' Association, dated November 3, 1969, modifying their resolution of September 8, 1969, to change the quantum of water for the Yavapai-Apache Indian Community from 432 to 500 acre feet.
8. Resolution of the Salt River Project Agricultural Improvement and Power District, dated November 13, 1969, modifying the resolution of September 8, 1969, to change the quantum of water for the Yavapai-Apache Indian Community from 432 to 500 acre feet.
9. Copy of a letter from J. A. Riggins, Jr., to George W. Hedden, dated September 10, 1969.
10. Copy of a letter from Frederic L. Kirgis to John McB. Meade, dated August 29, 1969.

White Mountain Apache Tribal Council Resolution No. 60–131 was passed providing that on page 4 of the Regional Solicitor's draft of July 17, 1969, there would be struck from lines 2 and 3 "the date each reservation was established" and would be inserted "the date of November 8, 1871". November 9, 1871 is the date the White Mountain Apache Reservation was established inclusive of the present Fort Apache Reservation and including the portion of the San Carlos Reservation within the Salt River Drainage. The Camp Verde Indian Reservation was established by the purchase of patented lands from private owners. The stipulation of the White Mountain Apache Tribe cannot be applied exactly. The Regional Solicitor's Office draft of July 17, 1969, therefore, has been modified by

action of the Phoenix Area Office as of November 18, 1969, to strike in lines 2 and 3 the language "the date each reservation was established" and inserting in lieu thereof "November 9, 1871, for the Fort Apache Reservation and the portion of the San Carlos Apache Reservation within the Salt River Drainage. The Yavapai-Apache Indian Community's water rights are appurtenant to the lands acquired by purchase comprising the present Camp Verde Reservation." The amendment is shown on the enclosed copy of the agreement.

The Regional Solicitor's draft of the agreement also is modified in Section 8 (c) on page 6 by the enclosed resolutions of the Camp Verde Yavapai-Apache Community, the Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District to change the quantum of water from 432 to 500 acre feet so that the subsection will read "For uses on the Camp Verde Indian Reservation, not to exceed 500 acre feet annually."

Your attention is particularly directed to Sections 6 and 18 on pages 5 and 11 of the agreement. The sections refer to future legal proceedings. It is the expectation of the parties in interest, as set forth in Mr. Kirgis' letter of August 29, 1969, (Mr. Kirgis is the general counsel for the Indians in these proceedings) and Mr. Riggins' letter of September 10, 1969, that there will be appropriate court proceedings to finalize the agreement as part of a court decree.

Messrs. Kirgis and Riggins jointly developed the methodology of proceeding. Thereon Mr. Riggins, while in Washington, contacted the Associate Solicitor (as of that date) for Indian Affairs, the Associate Solicitor for Reclamation and Power and in the Department of Justice, members of the Land and Natural Resources Division.

The quantums of water for all three of the reservations individually takes care of all present and prospective Indian needs. The agreement does not restrict the purposes for which the water may be used, thereby eliminating questions of agricultural usage only. In *Arizona* v. *California* in determining water for Indians a one percent component was added to the agricultural water depletion for related purposes. In negotiations leading to the agreement no such restrictions were applied; rather water for other purposes was figured realistically on a liberal basis as water additional to agricultural water. The amounts of water for the three reservations are substantially greater than in the Government's case for the Indians in the *Arizona* v. *California* proceedings. This office endorses the agreement. When approved and executed it will permit development on Indian land to proceed unimpeded by the threat of or the presence of major litigation.

We recommend early consideration and favorable action by the Bureau of Indian Affairs, the Bureau of Reclamation, by the Solicitor's Office and by the Department of Justice to the end that in the near future we can proceed with the signing of an agreement mutually acceptable to the water users and the Federal establishment which will avoid protracted complex litigation.

GEORGE W. HEDDEN.

Enclosures.

DISTRIBUTION LIST

Salt River Project, J. A. Riggins, Jr., White Mountain Apache Tribal Council, Through: Superintendent, Fort Apache Agency.

Barry De Rose, Superintendent, Fort Apache Agency, San Carlos Apache Tribal Council, Through: Superintendent, San Carlos Agency.

Royal D. Marks, Superintendent, San Carlos Agency, Yavapai-Apache Community Council, Through: Superintendent, Truxton Canon Agency.

Superintendent, Truxton Canon Agency, Frederic L. Kirgis, Regional Solicitor, Los Angeles, California; Field Solicitor, Phoenix, Arizona; Regional Director, Bureau of Reclamation, Boulder City, Nevada.

AGREEMENT

THIS AGREEMENT made this — day of ————, 1969, between the United States of America, hereinafter referred to as "United States," acting by and through the Secretary of the Interior, hereinafter referred to as "Secretary"; the White Mountain Apache Tribe, hereinafter referred to as "White Mountain"; San Carlos Apache Tribe, hereinafter referred to as "San Carlos"; Yavapai-Apache Indian Community, hereinafter referred to as "Yavapai-Apache"; the Salt River Valley Water Users' Association, a corporation organized under the laws of the Territory of Arizona and now existing under the laws of the State of Arizona, hereafter referred to as "Association", and the Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, hereinafter referred to as "District";

WITNESSETH THAT:

1. The Salt Lake River and its tributaries above Granite Reef Diversion Dam, hereinafter referred to as "Salt River system", drains an area of approximately 13,000 square miles and provides all or a portion of the water supply for the Fort Apache Indian Reservation, the San Carlos Indian Reservation and the Camp Verde Indian Reservation, located in whole or in part within such Salt River system, and also provides the surface water supply for the lands and the inhabitants of the Salt River Reclamation Project, hereinafter referred to as "Project".

2. The Fort Apache Indian Reservation consists of approximately 1,665,000 acres and is located within the drainage area of the Salt River system. The San Carlos Indian Reservation consists of approximately 1,854,000 acres, of which approximately 312,000 acres are within the drainage area of the Salt River system. The Camp Verde Indian Reservation consists of approximately 500 acres along or near the Verde River, a part of the Salt River system. The Tribal Councils of White Mountain, San Carlos and Yavapai-Apache are the governing bodies of Indian Tribes organized under section 16 of the Act of June 18, 1934, 25 U.S.C. §476, and represent the Indians of the Fort Apache, San Carlos and Camp Verde Indian Reservations, respectively.

3. The Project was authorized by Order of the Secretary dated March 14, 1903. Construction of the original features of the Project was undertaken and accomplished in accordance with the Act of June 17, 1902 (32 Stat. 388). By contract dated September 6, 1917, between the United States and the Association, the operation and maintenance of the Project works was transferred by the Secretary to the Association, and since said date the Association has represented its shareholders with respect to water rights for use within the Project. By contract dated March 22, 1937, between the Association and the District, subject to the rights of the United States, all properties of the Project were conveyed, transferred and assigned by the Association to the District, and by an amendment to said contract, dated September 12, 1949, the District, among other things, agreed to perform, discharge and comply with the duties assumed by the Association under the aforementioned contract dated September 6, 1917.

4. It is the contention of the Secretary, White Mountain, San Carlos and Yavapai-Apache that the rights to the use of the waters of the Salt River system on the Fort Apache, San Carlos and Camp Verde Indian Reservations have never been adjudicated. It is the contention of the Association and the District that all rights of the United States to the use of the waters of the Salt River system, including uses on Indian Reservations, were adjudicated in the case of Hurley v. Abbott, No. 4564 in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa. In addition thereto, the Association and the District contend that the United States and the Association have initiated and perfected other rights to the use of the waters of the Salt River system on behalf of the Association's shareholders. The Secretary, acting through the Bureau of Indian Affairs of the United States Department of the Interior, has asserted that substantially all of the rights to the use of waters of the Salt River system on the above-named Indian Reservations are prior in time to the water rights of the Association's shareholders owning lands in the Project. It has been further asserted that the right to use water sufficient for complete development on each Indian Reservation was impliedly reserved as of November 9, 1871, for the Fort Apache Reservation and the portion of the San Carlos Apache Reservation within the Salt River Drainage. The Yavapai-Apache Indian Community's water rights are appurtenant to the lands acquired by purchase comprising the present Camp Verde Reservation. The Association has asserted that substantially all of the water rights of its shareholders owning lands in the Project are prior in time and prior in right to those rights asserted for the above-named Indian Reservations.

5. Because of the position taken by the Association, developments contemplating the use of water on the Indian Reservations referred to in Paragraph 4 have been inhibited. On the other hand, the Association is concerned lest unrestricted developments on such Indian Reservations may deplete the water supply otherwise available for use of its shareholders owning lands within the Project. Because of these positions and the issues arising therefrom, it is desirable to reach an agreement recognizing, defining and limiting the use of water on these Indian Reservations in such manner and for such purposes as will permit orderly development on these Indian Reservations and in such manner as will not substantially impair lawful water rights of the shareholders of the Association and the economy of the area represented by lands within the Project. In an effort to reach such an

agreement, representatives of the Bureau of Indian Affairs and the Association conducted extensive negotiations that culminated in a memorandum of understanding which allocated specific quantities of water and set forth the method to be used to compute such quantities for these Indian Reservations. The Tribal Councils of White Mountain, San Carlos, Yavapai-Apache and the Board of Governors of the Association by formal resolutions have approved said memorandum of understanding and the purpose of this agreement is to formally effectuate the terms thereof.

6. It may be or become to the best interest of the parties hereto and the inhabitants and water users of the areas within their respective boundaries or reservations that any resolution of the issues existing between the parties hereto, as resolved by this agreement, be ultimately and finally approved by a court of competent jurisdiction and incorporated in a decree of such court, with such court exercising continuing jurisdiction over the matters and things included within such decree.

Now, therefore, in consideration of the covenants herein contained and the benefits to be mutually derived therefrom, the parties hereto agree as follows:

7. This Agreement supersedes the memorandum of understanding mentioned in Paragraph 5 hereof and now constitutes the entire agreement of the parties hereto.

8. As against the water rights of the shareholders of the Association, each of the Tribes of the hereinafter-named Indian Reservations may deplete the waters of the Salt River system without complaint and in perpetuity for irrigation, stockwater tanks, municipal and industrial and other beneficial uses in the following amounts:

(a) For uses on the Fort Apache Indian Reservation, not to exceed 36,500 acre feet annually.

(b) For uses on that portion of the San Carlos Indian Reservation located within the Salt River system, not to exceed 13,600 acre feet annually.

(c) For uses on the Camp Verde Indian Reservation, not to exceed 500 acre feet annually.

Amounts of water up to the limitations hereinabove established are for such beneficial uses as may be adopted by the Tribe occupying each of such Reservations. Amounts of water up to the limitations herein established are for beneficial use only on each of the Reservations, and shall not be sold, leased or otherwise disposed of for use off the Reservations or diverted from the Salt River system. The rights to use such amounts shall not be lost, abandoned or impaired by nonuser now or at any time in the future.

9. Amounts of water up to the limitations specified in Paragraph 8 for use on the respective Indian Reservations, for the purposes of this Agreement, are to be computed on a depletion basis at the following rates:

(a) Water applied to irrigation of agricultural lands will be charged at a depletion rate of 2 acre feet per acre irrigated.

(b) Municipal and industrial uses will be charged at a depletion rate of 100% of actual diversions.

(c) Stockwater tank uses will be charged at the following rates depending upon the elevation of the site of use:

(i) At elevations below 5500 feet above mean sea level the depletion rate will be 5 feet per surface acre per year.

(ii) At elevations from 5500–7000 feet above mean sea level the depletion rate will be 3 feet per surface acre per year.

(iii) At elevations over 7000 feet above mean sea level the depletion rate will be 1.5 feet per surface acre per year.

(d) Recreation lakes or other developed impoundments of water will be charged at depletion rates depending on the elevation of the site. For initial filling of the reservoirs the depletion rate will be charged at 100% of the amount actually impounded. Thereafter depletions will be charged as follows:

(i) At elevations from 5000–6000 feet above mean sea level the depletion rate will be 2.5 feet per surface acre per year.

(ii) At elevations from 6000–7000 feet above mean sea level the depletion rate will be 2 feet per surface acre per year.

(iii) At elevations over 7000 feet above mean sea level the depletion rate will be 1.5 feet per surface acre per year.

10. The Secretary shall supply maps delineating all developments on each of the Reservations to the Association, including annual modifications thereof as may be necessary to reflect changes occurring within the preceding year. The Secretary shall also furnish the Association with reservoir capacity curves for all

future water impoundments other than stockwater tanks prior to construction thereof and also such capacity curves as are presently available for impoundments already constructed. As soon as may be practicable after the close of each year, the Secretary and the Association will cooperatively compile an accounting of the water depletions on each Reservation.

11. Depletion rates for any contemplated use of water not within the above-mentioned categories of use and for which no depletion rate has been agreed upon will be negotiated by the parties hereto, who are directly affected, at the time of such new development; provided, however, that the total depletion allocations made in Paragraph 8 herein-above for each of the respective Reservations shall not be exceeded. In the event the affected parties are unable to agree upon a depletion rate for such new use or development, any affected party may request the secretary to make such determination. Upon receipt of such request, the Secretary shall set the matter for hearing at which the affected parties may present such evidence or opinions as they desire. At the conclusion of such hearing, the Secretary shall make his determination which shall be binding on the affected parties.

12. This Agreement shall not apply to any uses of water made by any fish hatcheries existing on the Reservations on the date of this Agreement which are operated by federal or state authority. This Agreement shall not be concerned with or affected by the Agreement among the Association, Phelps Dodge Corporation and Defense Plant Corporation entered into on the 1st day of March 1944, or the Agreement among the Association, District and Phelps Dodge Corporation entered into on the 23rd day of February 1962, which relate to trans-basin diversions of water made into and/or out of the Salt River system, nor shall uses on the Indian Reservations reduce the water quantities stipulated or impair operations under either Agreement.

13. This Agreement shall apply to all uses of waters on the Indian Reservations mentioned in Paragraph 8 hereof from surface or underground sources in the Salt River system, whether such waters occur naturally or are artifically produced, but shall not apply to uses of waters which are or may hereafter be imported from outside the Salt River system for Indian uses.

14. The parties hereto shall have full and free access to each others books and records, as far as they relate to the matters covered by this Agreement, with the right at any time during regular office hours to make copies of and from the same.

15. Where this Agreement provides for action by the Secretary, such action may be taken, subject to review by the Secretary, for and on his behalf by any duly authorized representative.

16. This Agreement shall not affect any rights or claims of the parties not specifically referred to and agreed to herein.

17. For the purposes of this Agreement, the following words and phrases shall have the following definitions:

(a) "Secretary" shall mean the Secretary of the Interior of the United States of America.

(b) "Association" shall mean the Salt River Valley Water Users' Association, a corporation organized under the laws of the Territory of Arizona and now existing under the laws of the State of Arizona.

(c) "District" shall mean the Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona.

(d) "Salt River system" shall mean that portion of the Salt River and its tributaries which naturally drain into the Salt River above Granite Reef Diversion Dam.

(e) "Annually," "annual" and "year" shall mean the period from January 1 through December 31.

(f) "Stockwater tank" shall mean an impoundment of water primarily for stockwater purposes which has less than 5 surface acres when full.

(g) "Municipal and industrial" use includes household, mining, milling and other like purposes.

(h) "Irrigation" shall mean the practice of artifically applying water to land for the purpose of nourishing plants.

18. Should any legal action or proceeding be brought or instituted by one or more of the parties hereto against one or more of the other parties hereto to determine the relative rights to the use of the waters of the Salt River system, the parties hereto agree that the issues raised by such legal action or proceeding shall be resolved in accordance with the provisions of Paragraphs 8 through 17 hereof and/or such alterations, additions or amendments as may hereafter be agreed upon by the parties hereto who will be directly affected by such alterations, additions or amendments. It is further agreed that the Court in which such legal

action or proceeding may be brought may incorporate in a decree all of the provisions of Paragraphs 8 through 17 hereof and any such alterations, additions or amendments as may be agreed upon as provided above as the measure and extent of the rights to the use of water on the Indian Reservations as set out therein as against the rights of the shareholders of the Association, except that, should the parties who are directly affected be unable to agree upon the matters mentioned in Paragraph 11 hereof, the decree shall provide for hearing before and determination of said matters by the Court rather than the Secretary. It is also agreed that a provision may be included in any decree entered in such legal action or proceeding to the effect that such Court may exercise continuing jurisdiction over the matters and things included within such decree. Nevertheless, in the absence of or pending the institution of any such legal action or proceeding, all parties hereto irrevocably agree to abide and be bound by all the terms, provisions, limitations, conditions and restrictions applicable to each of them which are included in this Agreement or any alteration, addition or amendment thereof that may be agreed upon as above provided.

19. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this Agreement or to any benefit thatmay a rise herefrom, but this restriction shall not be construced to extend to this Agreement if made with a corporation or company for its general benefit.

20. The waiver of a breach of any of the provisions of this Agreement shall not be deemed to be a waiver of any provision hereof, or of any other or subsequent breach of any provision hereof.

21. The Association and District warrant that no person or agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by Association or District for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Agreement without liability, or in its discretion, to require Association and/or District to pay, in addition to the contract price or consideration, the full amount of such commission, percentage, brokerage or contingent fee.

22. During the performance of this Agreement, the Association and District, hereinafter referred to as the "contractor", and the Secretary, hereinafter referred to as "contracting officer" agree as follows:

(a) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places available to employees and applicants for employment notices to be provided by the contracting officer setting forth the provisions of this Equal Opportunity clause.

(b) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

(c) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under the Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations and relevant orders of the Secretary of Labor.

(e) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(f) In the event of the contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations or orders, this contract may be cancelled, terminated or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.

(g) The contractor will include the provisions of subparagraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event the contractor becomes involved in or is threatened with litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

23. This Agreement shall be effective only after approval by resolution of the Tribal Councils of the Indian Tribes occupying each of the Reservations mentioned in Paragraph 1 hereof and by resolutions of the Association and District. The resolutions shall set forth the agreement of each of the parties to be bound irrevocably by the terms of this Agreement.

24. Nothing in this Agreement is intended in any manner whatever to affect rights or claims of rights to the use of water on any Indian Reservations located in whole or in part in the Salt River system other than on those Indian Reservations mentioned in Paragraph 1 hereof.

In Witness Whereof, the parties hereto have caused this Agreement to be executed the day and year first above written.

UNITED STATES OF AMERICA,
By _____ _____,
Secretary of the Interior.

WHITE MOUNTAIN APACHE TRIBE,
By _____ _____,

SAN CARLOS APACHE TRIBE,
By _____ _____,

YAVAPAI-APACHE INDIAN COMMUNITY,
By _____ _____,

Approved as to form and content.

_____ _____,
Counsel for Indian Tribes.

SALT RIVER VALLEY WATER USERS' ASSOCIATION,
By _____ _____,
President.

Attest:

_____ _____,
Secretary.

SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT,
By _____ _____,
President.

Attist:
By _____ _____,
Secretary.

Approved as to form and content.

_____ _____,
Counsel for Association and District.

Resolution No. 69–131.

RESOLUTION OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION

Whereas, the White Mountain Apache Tribal Council by Resolution No. 68–110 approved the Memorandum of Agreement of September 6, 1968 between the White Mountain Apache Tribal Council and the Salt River Water Users Association and the Salt River Project Agricultural Improvement and Power District, the San Carlos Apache Tribe and the Yavapai Apache Tribe, said agreement consummated at lengthy negotiations by a committee representing the Indian interest and another representing the Salt River Water Users Association and the Salt River Project Agricultural Improvement and Power District, and

Whereas, the terms of the aforesaid agreement are now being incorporated into a formal agreement as prepared by attorneys for the U.S. Department of the Interior, Salt River Water Users Association, the Salt River Project Agricultural Improvement and Power District, attorneys and councils for the respective Indian tribes, and

Whereas, the terms of the formal agreement are substantially the same as in the agreement of September 6, 1968 and by which terms the water uses of the White Mountain Apache Tribe are protected.

Be it resolved that the White Mountain Apache Tribal Council endorses and approves the formal agreement and further designates and directs the Tribal Chairman to sign the agreement and any minor modifications thereof on behalf of the White Mountain Apache Tribe when said agreement is approved by the Department of the Interior and the Department of Justice.

Be it further resolved that on Page 4 of said agreement that the agreement provide that it is the contention of the Secretary acting through the Bureau of Indian Affairs of the United States Department of the Interior that the date that the right to use water sufficient for complete development on each Indian reservation was impliedly reserved as of November 9, 1871.

The foregoing resolution was on September 5, 1969 duly adopted by a vote of 7 for and 1 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1(b) of the Amended Constitution and By laws of the Tribe, ratified by the Tribe June 27, 1958 and approved by the Secretary of the Interior on May 29, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

FRED BENASHLEY,
Acting chairman of the Tribal Council.
MARY C. ENDFIELD,
Secretary of the Tribal Council.

RESOLUTION NO. 69–35

Whereas, a major asset of the San Carlos Apache Indian Tribe is its right to use of water on its Reservation; and

Whereas, for some time there has been the threat of a suit being filed by the Salt River Valley Water Users Association to adjudicate its water rights on the Salt River Watershed; and

Whereas, on the recommendation of the Tribal Attorney a water law expert, namely Frederick L. Kirgis, was employed for the purpose of advising not only the San Carlos Apache Tribe but the White Mountain Apache Tribe and the Salt River Pima-Maricopa Community, in connection with this matter; and

Whereas, a Negotiating Committee was set up some time ago which Negotiating Committee worked out a Memorandum of Understanding which was presented to the Tribes concerned and which Memorandum of Understanding was approved by resolution of the San Carlos Apache Council on October 1, 1968, being Resolution 68–32; and

Whereas, under said Resolution the Tribal Attorney, Royal D. Marks, and Frederick L. Kirgis were authorized to proceed to work out a legal agreement with the Salt River Valley Water Users Association based upon the said Memorandum of Understanding; and

Whereas, the San Carlos Apache Tribal Council has now been informed by the Tribal Attorney, Royal D. Marks and Frederick L. Kirgis, that in their opinion a satisfactory agreement has been worked out setting forth the water allocation

and depletion rates as they pertain to the San Carlos Apache Indian Reservation; and

Whereas, copies of the said agreement have been given to the members of the San Carlos Apache Tribal Council for their consideration;

Now, therefore, be it resolved by the San Carlos Apache Tribal Council in meeting assembled this 2nd day of September 1969, that it approves the agreement as presented to it, copies of which are attached hereto and agree to be bound irrevocably by the terms of said agreement; and

Be it further resolved that it authorizes the Chairman of the San Carlos Apache Tribe to execute said agreement or a substantially similar agreement on behalf of the San Carlos Apache Tribe, when said agreement has been endorsed by the Department of Interior and the Department of Justice.

CERTIFICATION

I, the undersigned, Secretary of the San Carlos Council hereby certify that the San Carlos Council is composed of 11 members, of whom 8 constituting a quorum were present at a Regular Meeting thereto held on this 2nd day of September 1969, and that the foregoing Resolution No. 69–35 was duly adopted by 7 votes for and 1 against, pursuant to the provisions of Section 1, (a), Article V, Amended Constitution and Bylaws of the San Carlos Apache Tribe, effective February 24, 1954.

JANIE B. FERREIRA,
Secretary, San Carlos Tribal Council.

CAMP VERDE YAVAPAI-APACHE INDIAN COMMUNITY RESOLUTION NO. 10–69

Be it resolved, that the Tribal Council of the Yavapai-Apache Indian Community of the Camp Verde, Arizona Reservation hereby approves the Regional Solicitor's draft agreement dated July 17, 1969 between the Yavapai-Apache Indian Community, the San Carlos Apache Tribe, the White Mountain Apache Tribe and the Salt River Water Users Association provided and conditioned upon the amount of the depletion allowance being increased from 432 acre feet to 500 acre feet per annum,

Be it further resolved that the Community Chairman be authorized, and he is hereby authorized, to execute a resolution to be prepared to accompany the agreement and he is further authorized to execute the agreement on behalf of the Community.

CERTIFICATION

The above resolution was passed by the Yavapai-Apache Community Council at a regular meeting held on October 11, 1969 at the Tribal Council Building at Middle Verde with five (5) members present constituting a quorum. The resolution was approved by a vote of five (5) for, none (0) against and none (0) abstaining.

HARRINGTON TURNER,
Chairman, Yavapai-Apache Indian Community Council.

Attest:

EVA TURNER,
Secretary, Yavapai-Apache Indian Community Council.

RESOLUTION

Resolved, that the proposed agreement represented by the draft, designated as "Reg. Sol. L.A. Draft 7/17/69", between the United States of America, the White Mountain Apache Tribe, San Carlos Apache Tribe, Yavapai-Apache Indian Community, Salt River Valley Water Users' Association and Salt River Project Agricultural Improvement and Power District is hereby approved by the Board of Governors of the Association; and

Be it further resolved, that the President and the Secretary are hereby authorized to execute such Agreement for and on behalf of the Salt River Valley Water Users' Association; and that, pursuant to Paragraph 23 of said form of Agreement, the Association agrees that, upon the execution thereof by the President and Secretary, this Association shall be bound irrevocably by the terms thereof.

CERTIFICATE

I, F. E. Smith, the duly appointed, qualified and acting Secretary of the Salt River Valley Water Users' Association, Hereby Certify that the foregoing is a true and complete copy of a resolution adopted by the Board of Governors of said Association at a regular meeting thereof duly and regularly held on the 8th day of September, 1969, at which meeting a quorum was present and voted.

Witness my hand and seal of Salt River Valley Water Users' Association this 10th day of September, 1969.

F. E. Smith, *Secretary.*

Resolution

Resolved, That the proposed agreement represented by the draft, designated as "Reg. Sol. L.A. Draft 7/17/69", between the United State of America, the White Mountain Apache Tribe, San Carlos Apache Tribe, Yavapai-Apache Indian Community, Salt River Valley Water Users' Association and Salt River Project Agricultural Improvement and Power District is hereby approved by the Board of Directors of the District; and

Be it further resolved, That the President and the Secretary are hereby authorized to execute such Agreement for and on behalf of the Salt River Project Agricultural Improvement and Power District; and that, pursuant to Paragraph 23 of said form of Agreement, the District agrees that, upon the execution thereof by the President and Secretary, this District shall be bound irrevocably by the terms thereof.

CERTIFICATE

I, F. E. Smith, the duly appointed, qualified and acting Secretary of the Salt River Agricultural Improvement and Power District, HEREBY CERTIFY that the foregoing is a true and complete copy of a resolution adopted by the Board of Directors of said District at a special meeting thereof duly held on the 8th day of September 1969, at which meeting a quorum was present and voted.

Witness my hand and seal of the Salt River Project Agricultural Improvement and Power District this 10th day of September 1969.

F. E. Smith, *Secretary.*

U.S. Department of the Interior,
Bureau of Indian Affairs,
Washington, D.C., August 27, 1971.

Memorandum

To: Mr. John O. Crow, Deputy Commissioner.
From: William H. Veeder.
Subject: Rejection recommended for proposed "Salt River Agreement" as it relates to Fort Apache, San Carlos, Camp Verde and Yavapai Indians.

SUMMARY

You have requested my "current thinking and specific recommendations" as they pertain to the proposed arrangement alluded to in the subject. Accordingly a memorandum has been prepared which sets forth my "current thinking and specific recommendations." It is divided into these separate but closely related phases:

INTRODUCTION

Irreparable damage must ensue for the Arizona Indians and their reservations included in the "Salt River Agreement" if it is approved (a) Highly objectionable legal and procedural features of the "Salt River Agreement"; (b) Unjustified waiver of Indian immunity from suit by "Salt River Agreement" Demand for Senatorial investigation of Justice Department fiasco giving rise to Eagle River Decision.

(1) Failure to require dismissal of Kent Decree proceedings while subjecting Indians to additional but different litigation, must be condemned as irresponsible in light of this Nation's Trust obligations.

(2) Indians not only invite litigation if the "Salt River Agreement" is approved but abandon defenses in litigation which may ensue, including but not limited to the "invited" litigation and the Kent Decree proceeding.

(3) (i) American Indian Tribes here involved are immune from suit by reason of their Tribal sovereignty; (ii) Irresponsible waiver of that immunity by the "Salt River Agreement" to Indians' irreparable damage; (iii) Congressional investigation requested by Indians to protect their sovereign immunity from suit by reason of Justice Department's fiasco in Eagle River Decision.

(c) Rejection must ensue due to unreasonable and highly restrictive limitations upon Indian rights to the use of water contained in the "Salt River Agreement."

"Intolerable" Inherrent conflict of interest within interior. Department gave rise to the totally unacceptable "Salt River Agreement"

Conclusion.—Legally and factually the "Salt River Agreement" will cause irreparable damage to the Fort Apache, San Carlos, Camp Verde and Yavapai Indians.

Recommendation.—Both the American Indians here involved and the Bureau of Indian Affairs should reject the "Salt River Agreement" and adamantly resist any effort to impose it upon the Indians.

INTRODUCTION

You have requested my "current thinking and specific recommendations" as they pertain to the proposed arrangement alluded to in the subject. That proposed arrangement for easy reference will throughout this consideration be mentioned as the "Salt River Agreement" though it has not been executed and should never be executed, all as will be reviewed.

As drafted, the "Salt River Agreement" falls far short of the Presidential policy declaration respecting the protection of the American Indian interests in land and rights to the use of water. Guidelines for this consideration are taken from the July 8, 1970, Message to Congress in which he declared the Trust obligation of this Nation and established these criteria for fulfillment of that legal and moral obligation:

"Every trustee has a legal obligation to advance the interests of the [Indian] beneficiaries of the trust without reservation and with the highest degree of diligence and skill."

That the "Salt River Agreement" fails legally, factually and morally to meet the basic standards enumerated by the President, owing to the Fort Apache, San Carlos, Camp Verde and Yavapai Indians will be reviewed in detail.

Here these facts are set forth:

I requested, and the request was granted, to be relieved of any responsibility or identification with the "Salt River Agreement." That request was granted after receipt of the Deputy Solicitor's memorandum dated April 29, 1970, purporting to respond to a series of inquiries respecting that agreement set forth in the Commissioner's memorandum of January 16, 1970.

Upon reading the Deputy Solicitor's memorandum, I appraised it as being wholly evasive—hence further consideration of it was unwarranted. I had, and have, no desire to engage in a futile colloquy, knowing that, as events have proved, attempting to join issue with evasive responses is a time-wasting endeavor. On June 25, 1971, my conclusions respecting the Deputy Solicitor's memorandum and the need to avoid identification with the "Salt River Agreement" were confirmed all as will be more fully reviewed.

A further observation respecting the crucial issues here involved: Cancelling of a scheduled meeting in late July, 1971, without my knowledge, with the Fort Apache Tribe and possibly other Indians vitally interested in the "Salt River Agreement", fully to explain the position taken by Mr. Cook, Mr. Corke and me opposing the "Salt River Agreement," has raised the question of whether views contrary to the agreement are and will be withheld from the Indians as has so frequently occurred in the past to the irreparable and everlasting damage to the Arizona and California Indians.

Irreparable damage must ensue for the Arizona Indians and their Reservations included in the "Salt River Agreement" if it is approved

(a) Highly objectionable legal and procedural features of the "Salt River Agreement"

On June 25, 1971, in the presence of Messrs. Cook, Corke and Tim Dye, Superintendent of the Fort Apache Reservation, I presented this question to Mr. Kirgis and Mr. Marks who, it is understood, drafted the "Salt River Agreement":

Q. Will the Salt River Water Users Association agree to a dismissal with prejudice of the proceedings in Hurley v. Abbott to enlarge the Kent Decree?

A. No, the Salt River Water Users Association will not agree to dismiss the proceedings to enlarge the *Kent Decree*.[1]

Failure to dismiss with prejudice that proceeding to enlarge the *Kent Decree*, standing alone, is sufficient to bar Secretarial consideration of the "Salt River Agreement" wholly aside from the numerous other basic objections to the document.

Any doubt in regard to the continuing, pending and perilous nature of the threat to the Fort Apache and other Indians being subjected to major, costly and possibly disastrous litigation through prosecution of the proceedings to enlarge the *Kent Decree* to include them, is this excerpt from the Deputy Solicitor's memorandum of April 29, 1970:

"Following the Court's dismissal of the petition to enlarge the Kent Decree, the Association undertook to prepare to file a basin-wide adjudication action as the opinion and order of dismissal, in effect, invited it to do. Title searches were obtained on more than 12,000 parcels of land within the watershed on which use of water was evident and the cost to the Association was more than $500,000. The Association is still expending $1,000 per month to keep the title evidence current in the event it is necessary to file such a lawsuit. Other substantial amounts were expended for engineering and legal work. Additionally, the Association considered that it would cost not less than $750,000 more *to prosecute such an action with no assurance that it would eventually prevail.*" (Emphasis supplied)

Two facts are apparent: (1) Salt River Water users have expended huge sums and are continuing to spend large sums of money in contemplation of forcing the Fort Apache Indians and other Indians under the infamous *Kent Decree*; (2) Real beneficiary of the "Salt River Agreement" is the Water Users Association. It limits the Indians' rights—continues to threaten them with the *Kent Decree* proceedings. That type of arrangement is contra to the best interests of the Indians and is manifestly violative of the policy declaration of the President respecting the Nation's Trust responsibilities to the Indians.

(b) *Unjustified waiver of Indian immunity from suit by "Salt River Agreement." Demand for Senatorial investigation of Justice Department fiasco giving rise to Eagle River Decision*

(1) *Failure to require dismissal of Kent Decree proceedings while subjecting Indians to additional but different litigation, must be condemned as irresponsible in light of this Nation's Trust obligations.*

Irreparable damage to the Indians through the failure to require dismissal of the proceeding to enlarge the *Kent Decree* has been emphasized. That threat must be considered on the background of the invitation contained in the "Salt River Agreement" for additional litigation against the Indians by the "parties" or even more startling, "the inhabitants and water users" within "boundaries or reservations" of the parties.[2]

In the quoted excerpt on page 3 of this consideration, the Deputy Solicitor reports "12,000 parcels" of land in what is assumed to be the service area of the Water Users Association. Usually there are two or more parties to the parcel—husband and wife—mortgagor and mortgagee, which aggregates approximately 25,000 "parties" or perhaps fewer "water users" who could subject the Indians to litigation. As stated, that probability of litigation must be considered in contemplation of the *Kent Decree* proceeding which is independent and separate from the "invited" litigation to which the Indians will be subjected.[3]

When considering the truly anomalous and gravely threatening conditions which it is proposed should be imposed upon the Indians, reference is made to this statement by the Deputy Solicitor:

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[1] Noteworthy is this fact: Almost eighteen (18) months elapsed between the time the Commissioner asked this question and when I obtained my June 25 answer: "Is the proposed agreement dispositive of that litigation initiated to enlarge the Kent Degree, precluding further litigation of the character mentioned?" (Commissioner's memorandum January 16, 1970, Question 1.) Unlike the response from Messrs. Marks and Kirgis the Deputy Solicitor gave this equivocal and evasive answer: "The proposed agreement is not dispositive of the litigation to which your question relates because the action was dismissed some years ago. Hurley v. Abbott, 259 F. Supp. 669 (1966). However, the agreement is designed to settle the dispute which gave rise to the action and which still exists."

[2] Par. 6 of Agreement: "6. It may be or become to the best interest of the parties hereto and the inhabitants and water users of the areas within their respective boundaries or reservations that any resolution of the issues existing between the parties hereto, as resolved by this agreement, be ultimately and finally approved by a court of competent jurisdiction and incorporated in a decree of such court, with such court exercising continuing jurisdiction over the matters and things included within such decree."

[3] Could it be that the Board of Directors of the Water Users Association demanded some returns—and secured the "Salt River Agreement"—for the $500,000 already expended and the continuing $1,000 a month—with a possible three-quarters million bill to be spent in dubious battle, or as the Deputy Solicitor said, an action in which the Water Users Association had "no assurance that it would eventually prevail"?

The "Salt River Agreement" is not dispositive of the Kent Decree proceeding. "However, the agreement is designed to settle the dispute which gave rise to the action and which still exists." [4]

It is impossible to perceive, in the light of the refusal to dismiss the *Kent Decree* proceeding with prejudice, that it can sensibly be said that the "Salt River Agreement" is "designed" to settle that suit. Rather that agreement is a peril to the Indians on the basis of any reasonable assessment. I accordingly reject the Deputy Solicitor's concept and most assuredly recommend that this Bureau and the Indians join in that rejection.

(2) *Indians not only invite litigation if the "Salt River Agreement" is approved but abandon defenses in litigation which may ensue, including but not limited to the "invited" litigation and the Kent Decree proceeding*

Reference is made to the proviso in the "Salt River Agreement" set forth below.[5] Any party may bring an action in addition to the "invitation" to litigate reviewed above. If any party does so decide, the Indians are bound by the highly objectionable, restrictive and limiting provisions which severely damage the Indian interests, all as will be reviewed.

Succinctly stated, the Indians are subject to three types of litigation and are bound by the limitations the "Salt River Agreement" would impose upon them. They are:

1. Kent Decree proceeding on which the Water Users Association has spent and is now spending great sums of money;

2. The law suit the Indians invite by the "parties", "water users" or innumerable "inhabitants" to confirm the agreement;

3. An action "to determine the relative rights to the use of the waters of the Salt River system, the parties * * * agree that * * * such legal action or proceeding shall be resolved" in accordance with the limiting provisions of the "Salt River Agreement."

I do not readily believe that the Indians were adequately and fully advised of the diverse and perilous litigation the "Salt River Agreement" will subject them to, or the several limitations which would be imposed upon them by that "Salt River Agreement" if it is approved and they are subjected to the three types of litigation referred to above. Denial of the opportunity to discuss these facts with the Indian people is, as stated, unacceptable to me.

(3) (i) *American Indian Tribes here involved are immune from suit by reason of their Tribal sovereignty*

(ii) *Irresponsible waiver of that immunity by the "Salt River Agreement" to Indians' irreparable damage*

(iii) *Congressional investigation requested by Indians to protect their sovereign immunity from suit by reason of Justice Department's fiasco in* EAGLE RIVER DECISION

(1) American Indian Tribes are immune from suit by reason of their Tribal sovereignty. That immunity is an asset of immeasurable value. Dissipation of that invaluable asset in at least three (3) types of actions referred to immediately above by reason of the "Salt River Agreement" is intolerable—must be rejected by the United States Trustee or its fiduciary obligation is clearly violated. Indian immunity and the value of it has been recently reviewed in detail and the need to preserve it emphasized.[6]

Arizona's Supreme Court in regard to the Colorado River Tribes who occupy and are striving to preserve their rights to the use of water for the Great Colorado River Reservation, had this to say respecting Tribal sovereign immunity from suit:

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[4] Answer to question 1.

[5] Paragraph 18 of agreement: "18. Should any legal action or proceeding be brought or instituted by one or more of the parties hereto against one or more of the other parties hereto to determine the relative rights to the use of the waters of the Salt River system, the parties hereto agree that the issues raised by such legal action or proceeding shall be resolved in accordance with the provisions of Paragraphs 8 through 17 hereof and/or such alterations, additions or amendments as may hereafter be agreed upon by the parties hereto who will be directly affected by such alterations, additions or amendments. It is further agreed that the Court in which such legal action or proceeding may be brought may incorporate in a decree all of the provisions of Paragraphs 8 through 17 hereof and any such alterations, additions or amendments as may be agreed upon as provided above as the measure and extent of the rights to the use of water on the Indian Reservations as set out therein as against the rights of the shareholders of the Association, except that, should the parties who are directly affected be unable to agree upon the matters mentioned in Paragraph 11 hereof, the decree shall provide for hearing before and determination of said matters by the Court rather than the Secretary. It is also agreed that a provision may be included in any decree entered in such legal action or proceeding to the effect that such Court may exercise continuing jurisdiction over the matters and things included within such decree. Nevertheless, in the absence of or pending the institution of any such legal action or proceeding, all parties hereto irrevocably agree to abide and be bound by all the terms, provisions, limitations, conditions and restrictions applicable to each of them which are included in this Agreement or any alteration, addition or amendment thereof that may be agreed upon as above provided."

[6] Conflicts of Interest in Proceedings Before The Supreme Court of the United States—A Preface To Disaster For The American Indian People, pages 82 et seq.

"An impressive body of law has developed recognizing the immunity of Indian tribes from suit." [7]

Survival of the American Indians—if they are to survive confronted as they are with the immoral and illegal seizure of their rights to the use of water—turns upon full preservation and use of their Constitutional guarantees. Among those guarantees is their sovereignty which includes their immunity from suit.

(ii) Irresponsible waiver of immunity of the Fort Apache, San Carlos, Camp Verde and Yavapai Indians cannot be countenanced by the Trustee the United States of America. Yet that is precisely the consequence of the "Salt River Agreement." I cannot perceive of a more grave danger to the American Indian Tribes who would be subjected to the "Salt River Agreement" if it is approved, than to be confronted with law suits by any of the "parties" "to determine the relative rights to the use of water of the Salt River system * * *." [8] Neither is it possible to countenance law suits against the American Indian Tribes here involved by any "inhabitant" or "water users" to have adjudicated "* * * any * * * of the issues existing between the parties hereto,* * *." [9] A responsible trustee is required to know, when it subjects the beneficiary to suits, as to the nature of the "issues existing between the parties." I specifically deny that anyone can correctly state the "issues existing between the parties" under the "Salt River Agreement" and no responsible trustee would, under the circumstances, subject the beneficiary Indians to costly, contentious litigation of the nature which must necessarily arise by reason of the "issues."

I, of course, invite discussion as to the nature, kind and character of the law suits to which the Fort Apache, San Carlos, Camp Verde and Yavapai Indians are to be subjected by the "Salt River Agreement." Equally important is this question: Have those Indian Tribes been advised of the perils encompassing their possible destruction by the kind and types of immensely costly litigation to which they most assuredly will be subjected by the waiver of their immunity from innumerable but unknown types of litigation as the "Salt River Agreement" contemplates?

(iii) A Congressional investigation has been requested by Indian leaders representing an estimated 200,000 American Indians, in connection with the purported waiver of their sovereign immunity from suit stemming from the *Eagle River Decision*—that decision stems from a frightening fiasco.

American Indians of the Southwest have requested a Congressional investigation because the Justice Department trenched upon their sovereign immunity in the *Eagle River Case*. Yet the Fort Apache, San Carlos, Camp Verde and Yavapai Indians are being requested voluntarily to waive that immunity from suit. It is an anomaly that transcends understanding. Obviously in the sense of the Presidential policy respecting the obligation of this Nation to the American Indians, the Bureau of Indian Affairs must strongly contest—not join in—the disaster which could be visited upon the Tribes involved in the "Salt River Agreement" by their abandonment of their immunity from suit, all as reviewed above.

(c) *Rejection must ensue due to unreasonable and highly restrictive limitations upon Indian rights to the use of water contained in the "Salt River Agreement"*

Charles P. Corke and I have reviewed the restrictions and the limitations imposed upon the Indian rights to the use of water by the "Salt River Agreement" if it is approved. There is no alternative but to reject this totally unreasonable proviso:

"(b) Municipal and industrial uses will be charged at a depletion rate of 100% of actual diversion." [10]

"100%" depletion for municipal and industrial uses cannot be justified. Municipal and industrial return flows to the system can reach 90% of the diversion depending upon the circumstances. Rest assured Phoenix would not countenance a "100%" depletion charge against it for water delivered to it. That harsh and highly important proviso is unconscionable and must be both factually and legally rejected.

There must also be rejected as harsh and unreasonable this depletion procision:

"(a) Water applied to irrigation of agricultural lands will be charged at a depletion rate of 2 acre feet per acre irrigated." [11]

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[7] Morgan v. Colorado River Indian Tribe, 103 Ariz. 425; 443 P.2d 421, 423 (1968).
[8] See footnote 5, Sec. 18.
[9] See footnote 2, Sec. 6.
[10] Paragraph 9(b) of agreement.
[11] Paragraph 9(a) of agreement.

Elevation, points of diversion, place of use, nature of crops [gardens, small grains, corn], methods of use—numerous other elements—are involved in computing agricultural depletions. Sprinkler-irrigated pasture is becoming of great importance. Absent a full review and complete justification of the methods used in arriving at the depletion of "2 acre feet per acre" the arbitrary and highly restrictive limitation must, as stated, be rejected.

Rejection of those key depletion provisions probably require a rejection of all of the harsh limitations. Reference, however, must be made to other elements of arbitrary and unjust limitations upon the Indian rights.

For example, Fort Apache Reservation contains 1,665,000 acres. It has an abundance of invaluable land requiring water. There must be rejected as arbitrary and unjustified the limitation that the immense and highly valuable land be restricted to 36,500 acre-feet annually—for *all* purposes with the totally unsupportable depletion requirements.

These facts require full explanation:

In view of the huge evaporation losses at Roosevelt Reservoir and the other reservoirs totalling thousands of acres of surface water with losses reasonably calculated at 5 acre-feet per acre, with project losses of at least 20%; bank storage; stream and other losses, can it be reasonably asserted by the Trustee United States that the Indians must be harshly and unreasonably restricted as the "Salt River Agreement" contemplates?

Response to that inquiry must be NO. Moreover, whoever seeks to sustain those harsh requirements, must stand ready to defend them—an impossible task in the light of known facts.

"Intolerable" inherent conflict of interest within Interior Department gave rise to the totally unacceptable "Salt River Agreement"

The "Salt River Agreement" stems from the efforts to restrict the Indian rights to the use of water for the benefit of Salt River Federal Reclamation Project. That is, of course, the genesis of the infamous *Kent Decree* so destructive of the Salt River Indians and the Camp McDowell Indians.

In the light of the announced Presidential Policy, the "Salt River Agreement" should be rejected because of the "intolerable" inherent conflict of interest within the Interior Department which gave rise to it.

On the second page of the Summary, the conclusions and recommendations you requested are set forth.

Thank you for this opportunity to assist the Arizona Indians in their fight to survive.

3. LEGISLATIVE HISTORY OF THE COLORADO RIVER BASIN PROJECT ACT (PL 90–537), PREPARED BY NATIVE AMERICAN RIGHTS FUND, NOV. 2, 1971

Introduction

The Colorado River Basin Project Act, passed by the Congress in late 1968, is a study in controversy and short-sighted compromise. The scope of the legislation is broad, this being "to provide a program for the further comprehensive development of the water resources of the Colorado River Basin and for the provision of additional and adequate water supplies for use in the upper as well as the lower Colorado River Basin." The limitations written into the legislation prohibit full realization of the purposes of the Act. A chronologic approach to this legislation will point out the basic impasse faced by the Congress, the shortage of water in the Colorado River, and the inability of the Congress to come to grips with that shortage and to deal with it practically and rationally.

THE CONTROVERSY IN HISTORICAL PERSPECTIVE

Prior to 1922 the right to the use of the waters of the Colorado River was the subject of much dispute. The River was unchecked in its flow to the Gulf of California and those persons who were industrious and bold enough to tap its resource did so without regard for who might be the rightful owner of the water. First come, first serve was the early law of the River. The seven states within the drainage of the Colorado, however, looked ahead to a time of fuller River use and realizing that the right to water use must be decided to avoid future controversy, received permission from the Congress to enter into an interstate compact to decide the water rights questions of the Colorado River. The result was the Colorado River Compact of 1922. This compact divided the Colorado River Basin into two parts: the Upper Basin, composed of the states of Colorado, New Mexico, Utah and Wyoming; and the Lower Basin, composed of the states of Arizona, California and Nevada. The point of demarcation was Lee Ferry. The compact then went on to apportion the waters of the Colorado between the two basins. This apportionment was based on a primitive water flow study which stated that the annual average flow of the Colorado past Lee Ferry was upwards of 18 million acre feet (maf) per year. Based upon this estimated flow, the compact apportioned 7.5 maf per year to the Upper Basin, and 7.5 maf per year to the Lower Basin, plus an additional one million acre feet to the Lower Basin in years of surplus waters. The compact recognized that a treaty might be negotiated with Mexico, but assumed that any treaty obligation to Mexico could be satisfied by the surplus waters of the Colorado over and above that apportioned to each basin. If such surplus should prove insufficient, the two basins were to share the burden of supplying water to Mexico equally. The compact further provided that "[n]othing in this compact [should] be construed as affecting the obligations of the United States of America to Indian tribes," (Article VII) and that all "present perfected rights to the beneficial use of the waters of the Colorado River System [were to be] unimpaired by this Compact."

Two comments at this point. First, the Compact of 1922 apportioned water on the mistaken assumption that the annual flow of the River averaged nearly 18 maf per year. And second, the Compact recognized and preserved Indian water rights and other present perfected rights to the beneficial use of Colorado River water.

As it turned out, Arizona refused to ratify the Compact of 1922, believing itself to be short-changed by the Compact apportionment. Arizona's absence from the Compact proved to be but a temporary stumbling block to development of the River along Compact lines. The Congress overstepped Arizona's absence by passing the Boulder Canyon Project Act in 1928, effective in 1929.

The B.C.P.A. authorized the building of Hoover Dam, provided that six of the seven Colorado River Compact states including California ratify the Compact and also provided that California limit itself to a maximum use of 4.4 maf per

year. The B.C.P.A. also provided that water allocations to Lower Basin states should be 2.8 maf per year to Arizona, 4.4 maf per year to California, and 0.3 maf per year to Nevada. Hoover Dam was constructed and California passed the Limitation Act of 1941, forever prohibiting herself from any right to more than 4.4 maf per year from the Colorado River, but seemingly obtaining from the Congress approval for the use of that amount. Thus, Arizona, which had not ratified the Compact because it disagreed with the Compact apportionment, began to fear that it was being short-changed even further by the Congress.

When the United States negotiated the Mexican Water Treaty in 1944, Arizona saw the specter of its only major water faucet being turned off completely and immediately ratified the 1922 Compact to protect whatever Colorado River water rights it possessed.

The first Congressional attempt to settle Colorado River water rights differences between California and Arizona came in 1947 with the introduction into the Senate of S. 75, the Bridge Canyon-Central Arizona Project bill. At the same time the Bureau of Reclamation sent a feasibility report on the Central Arizona Project to the Department of the Interior. The favorable findings of the Bureau of Reclamation and the Department of the Interior were published in House Document No. 156. S. 75 did not emerge from Committee.

In 1949 the States of the Upper Basin entered into a Congressionally approved Upper Basin Compact, wherein the Upper Basin apportionment of 7.5 maf per year was divided between the Upper Basin states. This Compact had no effect on the Lower Basin, however, and Arizona and California remained locked in their dispute over who had what right to how much water from the Colorado River.

In 1951 a Central Arizona Project bill passed the Senate and was sent to the House. This bill was specifically aimed at bringing water to Arizona commensurate with the 1947 recommendation of the Bureau of Reclamation. It would have enabled Arizona to use Colorado River water, at least 1.2 maf per year, without deciding what right Arizona had to that water in the first place. For this reason the House Committee on Interior and Insular Affairs adopted a resolution which was ratified by the entire House to the effect that the Central Arizona Project question should be postponed until a court of appropriate jurisdiction determined the rights of parties to the Colorado River controversy. It was thought at that time that the determination would be swift. Arizona immediately brought suit against California and the ensuing legal battle took over ten years.

The litigation in *Arizona* v. *California* was referred to a special master whose report was issued in late 1960. In essence, Arizona contended that, pursuant to the Colorado River Compact of 1922 and the Boulder Canyon Project Act of 1928, she was entitled to the beneficial consumptive use of 2.8 maf per year from the Colorado River and that California was correspondingly limited to an entitlement of 4.4 maf per year.

The Supreme Court findings are summarized as follows:

The Colorado River Compact essentially divided the water between the Upper and Lower Basins, but it did not attempt to allocate water to individual States within either Basin. The Court held that neither the Compact, nor the law of prior appropriation, nor the doctrine of equitable apportionment controlled the division of Lower Basin water between the States of the Lower Basin, but that the Boulder Canyon Project Act authorized an apportionment of the lower Colorado River and hence must be used as a guide.

In ratifying the Boulder Canyon Project Act, California covenanted—by the Act of its Legislature—to limit its annual consumption of Colorado River water to 4,400,000 acre-feet plus one-half of any surplus. Under terms of the Act, Arizona and Nevada were allocated 2,800,000 and 300,000 acre-feet, respectively, with Arizona to share any surplus equally with California with provisions that should Nevada contract for 4 percent of the surplus, Arizona's share of such surplus would be reduced to 46 percent.

The apportionment of Lower Basin water was restricted to the main stream of the Colorado downstream from Lee Ferry within the United States. Each State retained exclusive use of its tributaries without charge to its apportioned water; consequently, the all-important use of the Gila River in Arizona was awarded to that State without charge against its main-stream entitlement—a key issue in the dispute.

The Secretary of the Interior, within the confines of the Act, has authority to allocate and distribute the waters of the main stream of the Colorado in water-short years, subject to power of Congress to enlarge or diminish his authority.

Indian reservations are given priority for water, dating from the time the lands in question became a part of the reservation.[1]

These findings were announced in the Opinion of the Supreme Court, June 3, 1963, and by the Court's Decree on March 9, 1964. The Opinion and Decree were based on the oral argument before the Court, the longest in the history of the Court, and on the report of the special master, filed with the Court in 1961. The master's report is significant in this history for two reasons: first, the report recommended that the waters of the Colorado River be apportioned to Lower Basin states as set forth in the Boulder Canyon Project Act, 2.8 maf per year to Arizona, 4.4 maf per year to California, and 0.3 maf per year to Nevada, and that any surplus water be divided equally between California and Arizona; and second, that in water-short years, the waters of the Colorado be divided proportionately between the Lower Basin states, 28/75 to Arizona, 44/75 to California, and 3/75 to Nevada. The first recommendation was accepted by the Court and incorporated into its Opinion and Decree. The second was unanimously rejected.

The rejection of the master's shortage formula is significant in that many believe that the master's formula is still the law of the Colorado River. The Court, on the other hand, found that no shortage formula was before the Court and declined to fashion one. They said that the Secretary of the Interior had authority to devise a formula, and that if he did it could be reviewed by the Court. But more important, the Court said that Congress had final authority and could write its own shortage formula.

To drive its point home, the Court went still further. It restricted the apportioning authority of the Secretary and the Congress, in the event of a shortage, to that portion of the water supply which is in excess of the requirements of "present perfected rights." These it defined as waters put to use before the effective date of the Boulder Canyon Project Act, June 25, 1929, plus the rights of Federal Reservations.[2]

Since the Court's decision in *Arizona* v. *California*, the Congress has seen various bills to authorize the Central Arizona Project. Immediately following the Court's Decree, S. 1658 and H.R. 6796, 6897, and 6798 were introduced. These bills never came out of Committee. In 1965 Senators Hayden and Fannin reintroduced S. 75, the old Bureau of Reclamation bill. Senators Murphy and Kuchel introduced therir own bill, S. 294. S. 294 was quite similar to H.R. 4671, a bill which not only authorized the C.A.P. but also attempted a regional approach to planning and water augmentation for the entire basin. H.R. 4671 also contained authorization of two Colorado River Dams at Bridge Canyon and at Marble Canyon. H.R. 4671 was reported favorably out of the House Interior Committee, but died in the House Rules Committee, purportedly because of the authorization of the two controversial dams. Thanks to extraordinary pressure by conservationists, the political axe descended on H.R. 4671.

THE COLORADO RIVER BASIN PROJECT ACT

The C.R.B.P.A. is a frustrated compromise. The Act was born in the Senate as Senator Hayden's Central Arizona Project Act, S.1004. In the House of Representatives it was introduced by Rep. Wayne Aspinall as H.R. 3300, the Colorado River Basin Project Act. The titles tell most of the story. The House bill, H.R. 3300 was kept almost intact by the Senate-House conference. In one very important respect, however, H.R. 3300 was eviscerated.

S. 1004

Starting with the premise, "Arizona needs and is entitled to more Colorado River water than she is now receiving," Senator Hayden introduced S. 1004. His co-sponsors were Senators Fannin, Cannon, and Jackson. The bill neglected the overwhelmingly obvious fact that there is *not* enough water in the Colorado River for *all* states to use *all* of their allocated waters. In fact, the bill's approach seemed to be based on the report of the special master in *Arizona* v. *California*, in that the bill approached the question of water allocation as if Arizona was absolutely entitled to 2.8 maf of water per year under all circumstances. S. 1004 stuck its head in the sand, pretended that there was enough water in the River forever to justify the C.A.P., and refused to authorize even a study of possible augmentation methods for the Colorado River Basin. S. 1004 gave to California a priority to 4.4 maf

[1] House Report No. 1312, April 24, 1968, at page 3679, *United States Code Congressional and Administrative News*, Vol. 3, 1968

[2] House testimony of Mr. Hosmer, Representative from California, May 15, 1938, at page 13425, *Congressional Record*, Vol. 114, 1968.

of water per year for 27 years. There were no mentions in S. 1004 of "present perfected rights" or of obligations to deliver water to Indian lands. The Hayden bill also authorized construction of two projects, Orme Dam and Hooker Dam.

Opposition to S. 1004 came primarily from the Senators from the other Colorado River Basin states, Senators Allott, Bennett, Dominick, Hansen, Kuchel, McGee, Moss and Murphy. Senators Aiken, Cooper, Miller and Prouty occasionally chimed in. Senators Kuchel, Hansen, and Allott led the fight against S. 1004. The view of the minority was essentially that the problems presented by the Colorado River were regional in origin; that any legislation should benefit the entire region and not just Arizona; that there is not enough water in the River to satisfy all needs and uses from all states; that the two dams deleted from the current bill that were included in H.R. 4671 should be reinstated; and, that regional studies for basinwide water augmentation were and are a necessity to any rational treatment of Colorado River problems and solutions. Senator Kuchel even went as far as to reintroduce H.R. 4671 to the Senate during debate as a substitute to S. 1004. This substitute measure never came to a vote. The Upper Basin Senators complained chiefly that under S. 1004 the Lower Basin, specifically Arizona, would be stealing Upper Basin water. The facts introduced into the record against S. 1004 were not contested; thus, the sponsors of S. 1004 seemed to admit *arguendo* that Arizona's C.A.P. would "borrow" water from the Upper Basin until such time as the Upper Basin put it to use.

The following facts about water supply were placed in the Record by those opposing S. 1004. On August 3, 1967 Mr. Dominick of Colorado said in discussing the Colorado River Compact of 1922, that 7.5 maf of water per year was allocated to both the Upper and the Lower Basin. This allocation was made on the estimated average annual flow at Lee Ferry of approximately 18 maf per year. Records have shown, however, that the average virgin flow at Lee Ferry is only 14.9 maf per year, and that there is only a 50% chance that 14.9 maf per year will flow past Lee Ferry. Mr. Dominick went on to point out that the average flow at Lee Ferry from 1914 to 1945 was only 15.6 maf per year; and from 1922 to 1964 the average was only 13.8 maf per year. Thus, he concluded that the solution to the water problem of the River is augmentation.[3] Mr. Dominick then had an editorial from the *Los Angeles Times*, June 9, 1967, read into the Record. After citing the fact that more than ten times the average annual flow of the Colorado River is lost to the sea each year from the Columbia River, the editorial states:

Water from interstate river systems like the Columbia does not belong to any one state and is subject to the will of Congress. But the state of Washington has very powerful representation in Congress, including Senator Henry Jackson, Chairman of the Senate Interior Committee.

Senator Jackson does not want any mention of importation studies in the Colorado River bill.

Senator Dominick's objections to S. 1004 were concentrated on that bill's lack of authorization of augmentation studies. Indeed, it was upon this deficiency that much attack was concentrated.

Mr. Hansen, Senator from Wyoming, read his own individual views into the Record from his "Individual Views" to the Senate Committee Report No. 408. Mr. Hansen itemized Lower Basin uses for the years 1961 through 1965:

Existing water uses [4] [1,000 acre feet]

Arizona	976. 4
California	4, 989. 4
Nevada	24. 2
Mexico	1, 850. 4
Lake Mead evaporation	800. 0
River evaporation	988. 2
	9, 628. 6

[4] *Congressional Record*, V. 113, p. 21375, August 3, 1967.

Senator HANSEN. The foregoing clearly shows that even without the Central Arizona Project the Lower Basin is *presently* using more water from the main stream than would be supplied to them under the 1922 Compact by the Upper Basin, when development therein is complete, and that this excess use at the present time from the main stream of the Colorado River may be as much as 2.1

[3] *Congressouali Record*, V. 113, p. 21372, August 3, 1967.

million acre feet annually. The Central Arizona Project as proposed in [this] legislation . . . would require an additional 1.2 to 2.0 million acre feet and Nevada proposes to utilize 0.3 million acre feet per year. Increased evaporation losses connected with this new additional development are assumed to be offset by the savings realized from the proposed channel improvement program. The combined total of all these ultimate demands on the main stream in the Lower Basin is 11.1 million acre feet per year, and even if we assume that California will cut back to her decreed allocation of 4.4 million acre feet per year, the demand will still be 10.5 million acre feet per year, or nearly 3 million acre feet per year in excess of the 7.5 million acre feet required to be delivered to the Lower Basin at Lee Ferry.[5]

Hansen is a bit overzealous here, as the well-accepted minimum delivery by the Upper Basin to the Lower Basin seems to be 8.25 maf per year; that is, 7.5 maf per year under the Colorado River Compact of 1922, and 0.75 maf per year as the Upper Basin's half of the Mexican Water Treaty obligation of 1.5 maf per year. The end result is nearly the same: a 2.25 maf overdraught by the Lower Basin. In other words, full use of all allocated waters demands augmentation of the Colorado River by not less than 2.25 maf per year.

Senator Murphy added that Arizona presently consumes 1.2 maf of water per year, leaving 1.6 maf of unused allocated water. He objected to the facet of S. 1004 which authorized the Granite Reef Aqueduct with a 3000 cu. ft. per second capacity for two reasons: first, the Bureau of the Budget had approved funding for a 2500 cu. ft. per second canal and not a 3000 cu. ft. per second canal; and, second, that full use of the larger canal would increase evaporation losses and bring the amount of water carried by such a canal to 2.0 maf per year. Thus, full use of the Granite Reef Aqueduct would bring Arizona's total consumptive use to 3.2 maf per year, or 0.4 maf of water per year over and above the 2.8 maf per year allocation given Arizona.[6]

Mr. Allott of Colorado went on to discuss the Colorado River water supply in detail, to show the impossibility of dealing practically in the present with the water supply problems on the basis of the Compact allocations of 1922. Under the 1922 Compact, the total water allocated is at least 17.5 maf per year: 7.5 maf per year to both the Upper and the Lower Basin, 1.5 maf per year to Mexico, and about 1.0 maf per year in evaporation losses. The Tipton Report breaks down the current supplies as follows: water available to the Upper Basin—6.3 maf/yr.; water available to the Lower Basin—7.5 maf/yr. Thus the total available is 13.8 maf per year, the current average annual flow. Less losses from Upper Basin reservoirs, this total shrinks to 13.1 maf per year, thus reducing the total available to the Upper Basin to 5.6 maf per year. Currently, approximately 3.0 maf are used by the Upper Basin, which leaves 2.6 maf per year unutilized at present. The C.A.P. would be supplied by this excess Upper Basin water at the outset, even though the Upper Basin starts out absorbing a shortage of from 1.2 to 2.0 maf per year depending on the Mexican Treaty obligation.[7] Mr. Allott continued:

The Bureau of Reclamation has estimaed that existing Arizona projects and Indian reservation needs will consume at full development 1.23 maf of water per year. This leaves a *maximum* available to Arizona of 1.57 maf per year *if* 7.5 maf of water are available. With a dependable yield of only 13.7 to 14.0 maf of water per year, *less* than 7.5 maf of water per year will be available for consumptive use in Arizona in 1977, because the Upper Basin will be developing its use of allocated water.[8] [9]

Concluding that to authorize the C.A.P. without also authorizing a study on Colorado River augmentation would be futile in view of the absence of enough water in the River to satisfy allocated demands, Senator Allott offered an amended bill which would authorize such a study. The amendment was defeated 70–12 and swift passage of S. 1004 was assured.

H.R. 3300

As previously mentioned, H.R. 3300, introduced into the House by Representative Aspinall of Colorado, was the prototype for the final legislation. Most of the language in H.R. 3300 was retained by the joint conference, with one

[5] Id.
[6] *Congressional Record*, V. 113, p. 21470, August 4, 1967.
[7] *Congressional Record*, V. 113, p. 21645, August 7, 1967.
[8] Ibid., p. 21652.
[9] See also Appendix "A" for a lucid discussion of projected Upper Basin uses and Colorado River problems in general by Edwin C. Johnson.

exception. Seemingly as a concession to the Senate for approval of the H.R. 3300 language, the River augmentation studies contained in H.R. 3300 were modified to the point of impotency or completely eliminated. Another feather in Henry Jackson's cap.

H.R. 3300 was founded on the drying sands of the Colorado River. It was based on the fact that there is not enough water in the Colorado River to satisfy all allocated rights at full use. As Rep. Smith of California put it:

In the Lower Basin states of California and Arizona a shortage would currently exist if these states were not now using water guaranteed for use by the Upper Basin states but not currently needed.

If the water supply of the Colorado is insufficient to satisfy the annual consumptive use of 7.5 maf per year—the amount now contracted for and guaranteed to users in Arizona, California, and Nevada—then the user who will suffer diminution of water is the new user authorized by the bill, the Central Arizona Project.[10]

Mr. Smith's remarks were intended to assure those members of the House from not only the Lower but also the Upper Basin that "present perfected rights" would be protected by H.R. 3300. Mr. Aspinall seconded this assurance:

[Speaking of *Arizona* v. *California,* 376 U.S. 340]

[T]hat decree directs the Secretary of Interior to first satisfy pre-1929 rights and then to allocate the remaining available water in accordance with applicable law. Section 301 [of H.R. 3300 and later of the Act] writes the applicable law which the Secretary would have to follow.

[From House Report No. 1312, April 24, 1968, summarizing the Supreme Court's Opinion and Decree in *Arizona* v. *California*] The Secretary of the Interior, within the confines of the Act [Boulder Canyon Project Act], has authority to allocate and distribute the waters of the main stream of the Colorado in water-short years, subject to the power of Congress to enlarge or diminish his authority.

Indian reservations are given priority for water, dating from the time the land in question became a part of the reservation.[11]

Mr. Hosmer, Representative from California, attempted to explain the effects of the Supreme Court's Opinion and Decree on water allocation in water-short years.

[The second half of the shortage formula] is written in the phraseology of the decree in *Arizona* v. *California* (376 US 340, 41, 42–44, 1964). In its simplest terms, it means that after California has born the first shock of the shortage, reducing her actual existing uses to 4.4 maf, incurring a certain and known loss of 700,000 acre feet of existing uses, the Central Arizona Project shall run the risk—if any there may be—of any further shortage, which reduces the whole supply below 7.5 million. But, Section 301 (c) goes on to provide, Arizona will be protected from this consequence if, and so long as, the water supply of the main stream is augmented by the introduction of enough additional water to restore the supply to 7.5 maf.[12]

Mr. Hosmer then read into the Record the text of Section 301(b) and (c). The sections are identical to Section 301(b) and (c) of the Act. The following page from the *Congressional Record,* V. 114, p. 13425, May 15, 1968, contains much pertinent information. It is included in full for that reason. Note the underscored portion under "Augmentation." This represents the *only* mention of salinity in the entire Record legislative history for both the Senate and the House! It is important to note that the bracketed paragraph which follows refers to the intentional consistency of the salinity figures there mentioned with Section 201(a)(2) of H.R. 3300. This section was eliminated at joint conference, in deference to Senator Jackson.

[From the Congressional Record, May 15, 1968]

The text of section 301 (b) and (c) reads:

(b) Article II(B)(3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient mainstream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the users in the State of California served under existing contracts with the United

[10] *Congressional Record,* V. 114, p. 13415, May 15, 1968
[11] *Congressional Record,* V. 114, p. 13416, May 15, 1968
[12] Ibid., p. 13424

States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection 301(b). This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree.

(c) The limitation stated in subsection (b) of this section shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment, the water supply of the Colorado River system in such quantity as to make sufficient mainstream water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada.

As explained in the report of the House Committee on Interior and Insular Affairs, the two halves of the formula—the 1928 half, burdening California, the 1968 half, burdening Arizona—work together like this:

Subsections (b) and (c) establish a shortage formula which assures California 4.4 million acre-feet ahead of the Central Arizona Project in any year in which the water supply of the Colorado River is not adequate to provide 7.5 m.a.f. of mainstream consumptive use in the Lower Basin and to satisfy the Mexican Treaty obligation. This formula applies to all uses in Arizona, California, and Nevada under present perfected rights (which means rights existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act), under existing contracts with the United States, and existing Federal Reservation rights.

In any year in which there is insufficient main stream Colorado River water available to satisfy annual consumptive use of 7,500,000 acre-feet in Arizona, California, and Nevada, diversions for the Central Arizona Project shall be so limited as to assure the availability of water to meet present perfected rights and other uses in Arizona, California, and Nevada, including existing Federal reservations, with a limitation of 4,400,000 acre-feet on California uses. Water users in the State of Nevada will not have to bear shortages in any proportion greater than would have been imposed in the absence of this section. The relative priorities, among themselves, of the water users in the three States whose rights are senior to diversions for the Central Arizona unit will not be affected by the provisions of this section.

The effect of the limitation on California imposed by section 4(a) of the Boulder Canyon Project Act is to require California to bear to the first impact of any shortage which reduce the water supply from the main stream of the Colorado River for the three States to 7.5 million acre-feet. There are existing projects in California designed and built to use 5.4 million acre-feet in anticipation of the avilability of 1 million acre-feet of surplus water, and the projects have actually used 5.1 million acre-feet., Thus California, would have to give us 700,000 acre-feet of existing uses when the main stream supply shrinks to 7.5 million acre-feet, and Arizona and Nevada require their full decreed rights. The effect of this section of the legislation is that if the supply of main stream water drops below 7.5 million acre-feet, the next impact of shortage will have to be borne by the Central Arizona Project. Under this condition diversions for the Central Arizona Project would have to be reduced to the extent necessary to assure the availability of water for use in Arizona, California, and Nevada by holders of present perfected rights and for meeting commitments to other users served under existing contracts with the United States, with the protection to Calfiornia limited, however, to 4.4 million acre-feet.

The provisions in subsection (b) have the effect of implementing Article II B(3) of the decree of the Supreme Court in *Arizona* v. *California* which deals with shortages in the 7.5 million acre-feet apportioned by the Supreme Court. Article II B(3) directs the Secretary to first satisfy perfected rights and to allocate the remaining available water in accordance with applicable law. This section writes the applicable law which the Secretary would have to follow.

Under the provisions of subsection (c) the limitation on the Central Arizona Project diversions stated in subsection (b) will be inapplicable in any year that the Secretary determines and proclaims that means are available and in operation to augment the water supply of the Colorado River System so as to provide annual consumptive use of 7.5 million acre-feet of mainstream water to Arizona, California and Nevada users.

A priority for present California uses, up to 4.4 million acre-feet per year, over new uses for the Central Arizona Project, has been one of the major stumbling

blocks in this and prior bills. If the flow of the River is eventually augmented, as a result of the studies authorized in Title II, the problem will become academic. If the augmentation does not occur, however, the decreased amount of water estimated to be in the River for use in the Lower Basin will curtail the water supply for the Central Arizona Project.

"AUGMENTATION"

Note particularly, in connection with section 301(c), how section 606(f) defines "augment":

"Augment" or "augmentation", when used herein with reference to water, means to increase the supply of the Colorado River or its tributaries by the introduction of water into the Colorado River System which is in addition to the natural supply of the system.

This definition excludes from the meaning of "augment," as used in section 301(c), the concept of exchanges of water on the California coastal plain or elsewhere which do not result in "the introduction of water into the Colorado River system." The reason is plain enough. Additional water must be introduced into the Colorado River to meet the requirements of the Mexican Water Treaty, as well as shortages in the main stream supply otherwise occasioned. *In addition to quantitative shortages, the Commissioner of Reclamation has made plain in his testimony that the introduction into the river of 2 to 2.5 million acre-feet annually of the equivalent of "distilled water" is necessary to prevent degradation of the present quality of water, bad as it is, 1,000 parts of salt per million, to 1,400 parts whenever upper basin depletions reduce the river's flow to the compact minimum. This is nearly three times the salt content which Public Health Service standards tolerate, and is the equivalent of 2 tons of salt per acre-foot. Moreover, if the water diverted in the United States contains 1,400 parts of salt per million, the return flow to Mexico will contain a much higher concentration.* The committee was, therefore, quite conscious of what it was doing when it restricted the meaning of "augmentation" to the "introduction of water into the Colorado River system which is in addition to the natural supply of the system."

This is intentionally consistent with the direction to the Secretary in section 201(a)(2) that he "investigate and recommend sources and means of supplying water requirements of the Colorado River Basin, either directly or by exchange, including reductions in losses, importations from sources outside the natural drainage basin of the Colorado River system, desalination, weather modifidation, and other means."

Indeed, benefits to the upper basin from introduction of water into the main stream below Lee Ferry can only come about by exchange of portions of such water, introduced in addition to that contemplated by section 301(c), for reductions in deliveries otherwise required from the upper division States at Lee Ferry. But this has nothing to do with section 301(c), and is a matter to be considered in future interstate agreements or acts of Congress.

DIFFERENCES BETWEEN H.R. 3300 AND PRIOR BILLS

Section 301(c) differs from provisions in earlier bills; for example, H.R. 4671, 89th Congress, which would terminate the priority protection whenever works are constructed to deliver 2.5 million acre-feet annually of imported water into the main stream. The difference is important in two respects: First, H.R. 3300 contemplates that, inasmuch as the lower basin shortage may be expected to materialize gradually as uses in the upper basin develop, successive introduction of a series of relatively small increments of additional water into the river may restore the lower basin supply, for a time, to 7.5 million acre-feet, so that the necessity for reductions in central Arizona project diversions may be successively postponed; second, under H.R. 3300 the protection of California's priority—and that of existing uses in Arizona and Nevada—does not cease upon the happening of a particular event. The change relieves Arizona from the fear that a major importation program will be inordinately delayed, thus requiring indefinite curtailment in Arizona's diversions, while reassuring California that the protection of her existing investments will not be erased, once for all time, by construction of augmentation works which subsequently prove to be inadequate to permanently restore the full 7.5 million acre-feet of supply. Both States regard this as a fair compromise.

For a further discussion of the shortage formula suggested by the Supreme Court see Appendix "B". At every point throughout the legislative history of H.R. 3300, the point is made that "present perfected rights" under existing contracts with the

United States and also existing Federal Reservation rights are protected by the provisions of Section 301 (b)(c). The House Report No. 1312 from the House Interior Committee concluded:

Subsections (b) and (c) establish a shortage formula which assures California 4.4 million acre-feet ahead of the Central Arizona Project in any year in which the water supply of the Colorado River is not adequate to provide 7.5 m.a.f. of mainstream consumptive use in the Lower Basin and to satisfy the Mexican Treaty obligation. This formula applies to all uses in Arizona, California, and Nevada under present perfected rights (which means rights existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act), under existing contracts with the United States, and existing Federal Reservation rights.

In any year in which there is insufficient main stream Colorado River water available to satisfy annual consumptive use of 7,500,000 acre-feet in Arizona, California, and Nevada, diversions for the Central Arizona Project shall be so limited as to assure the availability of water to meet present perfected rights and other uses in Arizona, California, and Nevada, including existing Federal reservations, with a limitation of 4,400,000 acre-feet on California uses. Water users in the State of Nevada will not have to bear shortages in any proportion greater than would have been imposed in the absence of this section. The relative priorities, among themselves, of the water users in the three States whose rights are senior to diversions for the Central Arizona unit will not be affected by the provisions of this section.

The effect of the limitation on California imposed by section 4(a) of the Boulder Canyon Project Act is to require Californai to hear the first impact of any shortage which reduces the water supply from the main stream of the Colorado River for the three States to 7.5 million acre-feet. There are existing projects in California designed and built to use 5.4 million acre-feet in anticipation of the availability of 1 million acre-feet of surplus water, and the projects have actually used 5.1 million acre-feet. Thus, California would have to give up 700,000 acre-feet of existing uses when the main stream supply shrinks to 7.5 million acre-feet, and Arizona and Nevada require their full decreed rights. The effect of this section of the legislation is that if the supply of main stream water drops below 7.5 million acre-feet, the next impact of shortage will have to be borne by the Central Arizona Project. Under this condition diversions for the Central Arizona Project would have to be reduced to the extent necessary to assure the availability of water for use in Arizona, California, and Nevada by holders of present perfected rights and for meeting commitments to other users served under existing contracts with the United States, with the protection to California limited, however, to 4.4 million acre-feet.

The provisions in subsection (b) have the effect of implementing Article II B(3) of the decree of the Supreme Court in *Arizona* v. *California* which deals with shortages in the 7.5 million acre-feet apportioned by the Supreme Court. Article II B(3) directs the Secretary to first satisfy perfected rights and to allocate the remaining available water in accordance with applicable law. This section writes the applicable law which the Secretary would have to follow.

Under the provisions of subsection (c) the limitation on the Central Arizona Project diversions stated in subsection (b) will be inapplicable in any year that the Secretary determines and proclaims that means are available and in operation to augment the water supply of the Colorado River System so as to provide annual consumptive use of 7.5 million acre-feet of mainstream water to Arizona, California, and Nevada users.

A priority for present California uses, up to 4.4 million acre-feet per year, over new uses for the Central Arizona Project, has been one of the major stumbling blocks in this and prior bills. If the flow of the River is eventually augmented, as a result of the studies authorized in Title II, the problem will become academic. If the augmentation does not occur, however, the decreased amount of water estimated to be in the River for use in the Lower Basin will curtail the water supply for the Central Arizona Project.[13]

H.R. 3300 was based on the fact that there was not enough water in the Colorado River to meet all allocated obligations, including the Mexican Water Treaty obligation. As mentioned, the sum of total allocations is 17.5 maf, while there is only a 50% chance that the total virgin flow for any given year will be 14.9 maf per year. To meet this obvious shortage, H.R. 3300 contained two provisions, both in H.R. 3300, Title II: the first authorized the Secretary of the Interior to engage in investigations and studies of means of augmenting the water resources of the Colorado River, including inter-basin transfers of water and the preparation

[13] House Report No. 1312, April 24, 1968, at pages 3714 & 3715, *U.S.C.C.&A.N.*, Vol. 3, 1968.

of reconnaisance and feasibility reports thereon; and, the second declared that the satisfaction of the Mexican Water Treaty obligation would be the first objective of any water augmentation project within the Colorado River Basin, thus making the Treaty obligation a national obligation rather than a regional one whose burden falls heavily on local water users. Opposition to H.R. 3300 centered on these two provisions. It was argued, chiefly by Representative Saylor and members of the House from the Pacific Northwest, that there should be no reconnaisance or feasibility reports on augmentation because there is enough water in the Colorado to make the C.A.P. feasible in itself until 1990–2000, and that to authorize such studies would be a mere duplication of similar authority which currently exists in the provisions of the Water Resources Planning Act, Section 103 (P.L. 89–90, 79 Stat. 244). They also objected strenuously to the making of a national obligation out of the Mexican Water Treaty.

I will postpone an in-depth discussion of water availability and current and projected depletion figures for the moment. They will be considered in the conclusions which may be drawn from the Act, as passed, and its history.

HOOKER DAM

A small diversion from the main stream of this memorandum is necessary to consider a special problem with respect to the Act. Both S. 1004 and H.R. 3300 included authorization of Hooker Dam on the Gila River in New Mexico as part of the total project. Hooker Dam would be built to impound water for consumptive use in New Mexico.

Typical of S. 1004, the Senate bill took a blind approach to the need for a dam on the Gila. Its authorization of the Hooker site was without qualification. It appears, however, that the thought process in the House was a bit more thorough. The House Interior Committee considered the fact that studies needed to be done before a final decision was made with respect to the site. Thus, they amended the language of Section 301(a) to call for authorization of Hooker Dam or a "suitable alternative." The Committee's conclusions are as follows:

Subsection (a) authorizes the construction of the Central Arizona Project including *the Hooker dam* and reservoir in New Mexico or suitable alternative. The elements of the Project have been described in Part X of this report.

The Hooker dam project is included in this legislation to provide the storage necessary for downstream flood protection and to permit New Mexico to use at least 18,000 acre-feet of water over and above the amount in the decree in *Arizona* v. *California*. The present Hooker dam plan is based on reconnaissance studies many years old. The studies need to be up-dated giving consideration to all new and pertinent information presented during the Committee's hearings. The flexibility needed for modifying the plan on the basis of the further studies is provided by the inclusion in the legislation of the words "or suitable alternative" following the language which authorizes Hooker dam and reservoir. In restudying this feature, the Secretary should give consideration to all the usual factors that go into determining the most feasible development. In this instance, particular attention should be given to the matter of water loss due to evaporation and the fact that the present proposal involves a minor intrusion into the Gila wilderness area.

Thus, the Committee, or at least a majority thereof, went on record as recommending the Hooker site, provided that new studies are completed. They also recognized that the impounding of water behind the dam would inundate part of the Gila Wilderness area. With this, however, the majority did not seem too concerned.

Several members of the Committee, however, were concerned and pointed out their objections to the Hooker Dam site. The views of the minority are summarized as follows:

(1) The building of a dam at the Hooker site would result in the backing of slack water across land within the Gila Primitive Area, which is subject to review for future inclusion in the National Wilderness Preservation System, and through the Gila Gorge some nine miles within the Gila Wilderness Area.

(2) The Gila Wilderness Area is one of 54 units of the National Wilderness Preservation System, established by Congress in 1964 by means of the Wilderness Act (P.L. 88–577). "*It should not be degraded by a man-made, unnatural intrusion as a result of this legislation.*" [14]

(3) The words "Conner Dam or suitable alternative" should be substituted for the present words, which substitution at a minimum "must be interpreted by the Secretary of the Interior as a clear mandate to find an alternative to the Hooker site." [15]

(4) The present wording, "Hooker Dam or suitable alternative," requires that a study be conducted pursuant to the Wilderness Act. The Act requires that a determination be made that the water-development project within a Wilderness Area will better serve the interests of the United States than will its denial, taking into account at least: 1) the uses to which the water would be put and the benefits that would accrue to the people of the United States; 2) the comparative advantages of different methods of providing water, such as, but not limited to, reservoir storage at various sites, purification of brackish water, and pumping from underground sources; 3) means for protecting existing water rights; 4) damage to the natural environment, wildlife and scenic resources, particularly those public lands within the Wilderness Area and Primitive Area; 5) the construction, maintenance and other costs of dams at the Hooker site, the Conner site, and other suitable alternatives, or other alternative water supply methods.

(5) This is the first time Congress has faced the problem of the possibility of violating the wilderness character of land sought to be preserved for its wilderness character. Other areas are threatened by similar action. Thus, Hooker Dam becomes a "test case." If the Dam is authorized and built, it establishes dangerous precedent. "An alternative to Hooker Dam can and must be found." [16]

(6) "We urge that the Secretary of the Interior find an alternative to Hooker Dam which will both provide New Mexico with its water and preserve the integrity of the National Wilderness Preservation System." [17]

The above views, signed by 17 members of the House, including the present Secretary of the Interior, Rogers C. B. Morton, were dismissed by the Committee as irrelevant and unnecessary. The Committee felt that its language was protective enough as it stood.

CONCLUSIONS

From the above discussion several points are obvious. The Act, as passed, incorporated most of the provisions of H.R. 3300 *verbatim*. Because of the power of Senator Jackson, however, water augmentation studies which would have been authorized by H.R. 3300 were deleted from the final bill. This is important for two reasons: first the entire bill, as passed, is based on the premise that more water must be added to the Colorado River System because there is not enough water in the River to satisfy present or future needs; and, second, without water augmentation studies, prohibited by the Act until September 29, 1978, the Central Arizona Project will become an obsolete fiasco.

Water studies completed on the Colorado River show that the annual average flow at Lee Ferry has ranged between 5.6 and 24.0 maf per year since 1896; the long-term average including 1967 is about 14.8 maf of water per year. Average annual flows have showed a steady decline. The average annual flow from 1914 to 1945 was estimated at 15.6 maf per year. For the period from 1922 to 1967, the annual virgin flow past Lee Ferry has been only 13.7 maf per year. The average for the 1930 to 1967 period is only 13 maf per year. The following table shows that the running average for the ten year period, 1958 to 1967 amounted to only 12.1 maf per year. It is readily apparent that the water supply of the Colorado is not sufficient to meet the needs of all users at present if dependent on a steady flow. As was pointed out at pages 11 through 13 above, 1968 Lower and Upper Basin uses totaled about 12.5 maf for that year, including Mexico. This is already about 500,000 acre feet over the average entire water supply for the ten year period 1958–1967.

[14] "Separate Views on Hooker Dam Site" House Report No. 1312, April 24, 1968, at page 3767, *U.S.C.C. & A.N.*, V. 3, 1968

[15] *Id.*

[16] *Separate Views*, supra, note 14.

[17] *Id.*

TABLE I.—ESTIMATED VIRGIN FLOWS AT LEE FERRY[1]

[In millions of acre-feet]

Water year ending Sept. 30	Estimated virgin flow	Average including 1967	10-year running average	Water year ending Sept. 30	Estimated virgin flow	Average including 1967	10-year running average
1896	10.1	14.8		1932	17.2	13.1	15.9
1897	18.0	14.9		1933	11.4	13.0	15.2
1898	13.8	14.8		1934	5.6	13.0	14.3
1899	15.9	14.9		1935	11.5	13.3	14.2
1900	13.2	14.8		1936	13.8	13.3	14.0
1901	13.6	14.9		1937	13.7	13.3	13.5
1902	9.4	14.9		1938	17.5	13.3	13.5
1903	14.8	15.0		1939	11.1	13.1	12.5
1904	15.6	15.0		1940	8.6	13.2	11.8
1905	16.0	15.0	14.0	1941	18.1	13.4	12.8
1906	19.1	14.9	14.9	1942	19.1	13.2	13.0
1907	23.4	14.9	15.5	1943	13.1	13.0	13.2
1908	12.9	14.7	15.4	1944	15.2	13.0	14.2
1909	23.3	14.8	16.1	1945	13.4	12.9	14.4
1910	14.2	14.6	16.2	1946	10.4	12.9	14.0
1911	16.0	14.6	16.5	1947	15.5	13.0	14.2
1912	20.5	14.6	17.6	1948	15.6	12.8	14.0
1913	14.5	14.5	17.6	1949	16.4	12.7	14.5
1914	21.2	14.5	18.1	1950	12.9	12.5	15.0
1915	14.0	14.4	17.9	1951	11.6	12.5	14.3
1916	19.2	14.4	17.9	1952	20.7	12.5	14.5
1917	24.0	14.3	18.0	1953	10.6	12.0	14.2
1918	15.3	14.1	18.2	1954	7.7	12.1	13.5
1919	12.5	14.1	17.1	1955	9.2	12.4	13.1
1920	22.0	14.1	17.9	1956	10.7	12.7	13.1
1921	23.0	13.9	18.6	1957	20.1	12.9	13.5
1922	18.3	13.7	18.4	1958	16.5	12.1	13.6
1923	18.3	13.6	18.8	1959	8.6	11.7	12.9
1924	14.2	13.5	18.1	1960	11.3	12.0	12.7
1925	13.0	13.5	18.0	1961	8.5	12.1	12.4
1926	15.9	13.5	17.6	1962	17.3	12.7	12.1
1927	18.6	13.5	17.1	1963	8.5	11.8	11.8
1928	17.3	13.3	17.3	1964	10.2	12.7	12.1
1929	21.4	13.2	18.2	1965	18.7	13.5	13.0
1930	14.9	13.0	17.5	1966	10.8	10.9	13.1
1931	7.8	13.0	16.0	1967	11.0	11.0	12.1

[1] Col. 2 shows the estimated virgin runoff at Lee Ferry for the year indicated in col. 1. Col. 3 shows the average virgin runoff from the year indicated in col. 1 through 1967. Col. 4 shows the progressive 10-year running average virgin flow through the year indicated in col. 1.[18]

[18] House Report No. 1312, April 24, 1968, at p. 3584, U.S.C.C. & A.N., vol. 3, 1968.

One would have to assume that Lake Mead and Lake Powell, plus various other storage facilities, make such an overdraught possible. But, in light of the above it seems only academic and indeed highly suspect to talk about supplying *any* water to a newly built C.A.P., let alone up to 1.65 maf of water per year.[18]

The Committee Report glosses over this crucial shortage:

Basically the Colorado River water supply for the Central Arizona Project will come from two sources: (1) regulated releases from Glen Canyon Dam and (2) spills from Glen Canyon Dam into the Lower Basin. * * * the breakdown of the estimated CAP water supply from these two sources is as follows:

[In thousands of acre-feet][1]

Source	1975	1990	2000	2030
Regulated release	1,650	1,020	730	284
Upper basin spills	0	235	296	392
Total	1,650	1,255	1,026	676

[1] With aqueduct capacity of 2,500 cubic feet per second.

The Committee understands that, absent a supplemental supply of water from other sources, beginning about year 1975, the Bureau of Reclamation anticipates that a part of the CAP water supply will come from reservoir spills from the Upper Basin, and that under the 2030 conditions assumed by the Bureau about 60 percent of the one-half water supply that will be available will have to be de-

rived from spills from full Upper Basin reservoirs. The Committee is also aware of the fact that the estimated spills are averages over the period 1906–65, that the actual spills would be limited to a few years and dependent upon repeat of the 1911–1929 flows, and that if the runoff period 1922–67 were used as the basis of analysis there would be no spills of water available from the Upper Basin and the entire water supply for the Central Arizona Project would have to come from regulated releases at Glen Canyon Dam.[19]

The last four lines of the above paragraph tell the story. Once again the lawmakers have played ostrich. There will be no spills; there will be no water for the C.A.P. The water will come from "regulated releases" from Lake Powell, Upper Basin water.

The Committee's Conclusions on Water Supply

1. The Committee believes that the results of studies submitted in testimony on H.R. 3300, and H.R. 4671 of the 89th Congress, reveal the water supply situation of the Colorado River Basin in proper perspective, and that they clearly demonstrate the limitations of the water resource as accurately as possible. These analyses, having utilized more refined techniques than those employed in the past, are probably more indicative of water availability than are earlier studies.

2. All of the studies indicate the presence of a serious water deficiency in the Lower Basin of the Colorado River; in fact, they show that a real crisis is being faced by Arizona, southern California, and Nevada. Even in the Upper Basin the remaining Colorado River water is fast being exhausted as development goes forward.

3. All of the studies show conclusively that any large increase in use of water in the Lower Basin must, even now, be supplied in part from water apportioned by the Colorado River Compact to the Upper Basin States but presently unused by them. As the Upper Basin States progress with their development, the amount of unused water will diminish until ultimately no surplus Upper Basin water will be available for use in the Lower Basin.

4. Based upon the studies that have been examined by the Committee and its staff, the Committee believes that 1,200,000 acre-feet can reasonably be expected for the Central Arizona Project until some time during the decade 1985–1995, after which time, due to the priority granted to California by this legislation and as a consequence of the increasing consumption of water in the Upper Basin, the supply will diminish unless augmented from other sources.

5. The basic assumptions of the Department of the Interior with regard to virgin runoff, rate of increase and ultimate magnitude of Upper Basin stream depletion, and magnitude of future net losses along the Lower Colorado River are matters of judgment and, in the future, the Department's reliance on the assumptions used in its analyses shall in no manner jeopardize the consumptive use of water within compact apportionments in other areas of the Colorado River Basin.

6. On the basis of the water supply analyses furnished to the Committee and the testimony presented on H.R. 3300 and predecessor related legislation, the Committee has determined that the water supply of the Colorado River will neither be sufficient to meet future requirements of the areas dependent upon it, nor to meet apportionments of the consumptive use of water made by the Colorado River Compact to the Upper and Lower Basins plus the delivery of water to Mexico as required by international treaty. It is inevitable that water requirements will exceed the supply. This condition will occur with or without a Central Arizona Project. It is estimated that the amount of new water necessary to meet the Mexican Treaty requirements and the aforementioned apportionments in the Lower Basin alone ultimately will be between 2 million and 2.5 million acre-feet.

7. In order to prevent retrogression of the economy of the Colorado River Basin as its water resource diminshes, the Committee concludes that all means of increasing the water supply—such as reductions in water losses, water conservation practices, desalination, weather modification, importation of water from outside the drainage basin of the Colorado River—should be investigated and thoroughly studied as soon as possible.

8. The Committee has concluded that the most urgent and fundamental water resource issue before the Congress involves an initiation of plans and procedures pertaining to the resolution of the water supply deficiency of the entire Colorado River Basin as defined in the Colorado River Compact. The Committee is convinced that enactment and implementation of Title II in the form it has been approved will be a constructive step in the right direction.

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[19] House Report No. 1312, supra, at p. 3686, *U.S.C.C.&A.N.*

9. Notwithstanding the anticipated water shortage on the Colorado River, if there is no augmentation, the committee finds that the Central Arizona Project is feasible with the presently known water supply. The importation of Colorado River water into central Arizona will reduce the need for groundwater, thus reducing the rate of decline of the water table. During periods of shortage on the Colorado River, diversions to central Arizona can be reduced and the groundwater can be again pumped into the irrigation and domestic supply systems.[20]

The Committee then concluded its report with a discussion of the great need for westwide water studies and augmentation. The Committee admitted that the provisions for the C.A.P. "provide a long-term firm water supply . . . of only 284,000 acre feet annually, compared to a planned average annual water supply of 1.2 maf, and that even this limited supply assumes that the Upper Basin states will furnish one-half of the Mexican Water Treaty," and, "[t]he need for augmentation is beyond reasonable dispute." [21]

The Committee went on to show that 15–25 years are required "to plan, authorize, design, and construct a major water project. Hence, studies of alternative means of augmenting the Colorado River must be initiated immediately if the future growth and economy of the Colorado River Basin and the Pacific Southwest is to be assured . . ."

Considering the potential lead time needed to develop some of the alternatives, the studies must be completed and the facts must be before the Congress by not later than the mid-1970's. Under these circumstances, deferral of the studies would represent procrastination, and could result in decisions under crisis conditions rather than on the basis of orderly procedures.

The most pressing need is for an amount of new water necessary in order to satisfy the Mexican Treaty water requirements and the annual consumptive use of 7.5 million acre feet in the States of Arizona, California, and Nevada. This amount has been estimated by water experts to be ultimately between 2 million and 2.5 million acre-feet, depending on assumptions with respect to Lower Basin inflows, evaporation losses, and other water losses between Glen Canyon Dam and the Mexican border.

It is this most pressing need which is the basis for the provision in this legislation calling for preparation of a feasibility report on the most economic means of augmenting the water supply of the Colorado River by 2.5 million acre feet, with a January 1975 deadline for submission of such report to the Congress.

The other studies and investigations would be only in such detail as to permit the preparation of reconnaissance reports. All of the studies and investigations taken together are directed toward development of a regional water plan to serve as the framework for coordinated, future development throughout the entire Colorado River Basin.

As indicated hereinbefore, *the Committee's approval of the Central Arizona Project is tied to immediate initiation of meaningful augmentation studies. This committee position stems from the fact that the states of the Colorado River Basin reached a consensus that they would not object to development that overcommits the river's limited resources before long-range augmentation studies are completed, provided studies of alternative means of augmenting the Colorado are conducted concurrently.* To maintain the consensus, meaningful studies of all alternatives must be carried out on a strict timetable to provide assurance against the certain need in the future to apportion shortages from an overcommitted supply in the event nothing is done to augment the natural supply. The Lower Basin now relies in part upon the availability of unused water supplies apportioned to the Upper Basin by the Colorado River Compact. The slower developing states of the Upper Basin consider the studies under Title II as a meaningful step toward augmentation and as further assurance that they will be able to utilize fully their entitlements when the need arises.

The Committee has been disappointed that study provisions set out in Title II could not be made acceptable to the Pacific Northwest States. Every attempt was made to do so. However, those representing the Northwest continued to insist that only complete elimination of Title II would be acceptable.[22]

The underscored section above demonstrates the design behind H.R. 3300, to overcommit the Colorado River now and to implement augmentation studies to reduce that overcommitment in the future when the shortage becomes critical.

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[20] House Report No. 1312, supra, *U.S.C.C.&A.N.*, at p. 3686–88.
[21] House Report No. 1312, Supra, *U.S.C.C.&A.N.* at p. 3688.
[22] House Report No. 1312, supra, *U.S.C.C. & A.N.*, at page 3689.

With the deletion of the study provision by the Pro-Jackson faction of the joint conference, the bill's implementation mechanism had its gears stripped and removed, leaving behind a motionless Edsel of a solution to the critical water problems of the Southwest. The Act, in its final form, "overcommits" an already dying source of water. The Committee of the House found the project feasible because it would assist in saving the dwindling ground-water supply of Phoenix and Tucson. We might call this attempt to save that ground-water supply "legislative water-overkill." The ultimate result will be disastrous to the economy of the Southwest, and to the entire western portion of the United States as well.

It is foreseeable that a Central Arizona Project will be built, based on the premise that the Phoenix-Tucson areas will continue to expand and grow and will need ever-increasing supplies of water to prevent total depletion of the ground-water supply. The C.A.P. will supply water for a time and the area will grow as predicted, *but only because the C.A.P. is bringing in the necessary water.* But, the Colorado River cannot support the C.A.P. along with present uses and some Upper Basin development. As predicted, the C.A.P. will begin to reduce its flow. But at the same time there will be more people in the Phoenix-Tucson area who need water, people drawn there because there *was* water made available in the first place by the C.A.P. In the meantime, as predicted, without a program for augmenting the flow of the Colorado River below Lee Ferry with about 2.0 maf of "distilled water" each year, the salinity of the River below the C.A.P. diversion will have increased nearly 50% from 1000 ppm salt to 1400 ppm salt, thus rendering the water below the diversion unfit for any use by holders of "present perfected rights" or by Indian tribes. Any invasion of those water rights guaranteed to users under *Arizona* v. *California* and reiterated by the Act itself would be illegal. Thus, the very Act which authorizes the C.A.P. without also authorizing a "distilled water" augmentation program, defeats its own purpose and renders the C.A.P. legally obsolete before its construction. A step by step analysis bears this out.

(1) The act

A. Authorizes construction of the C.A.P.

B. Authorizes diversion of Colorado River water up to 1.6 maf per year.

C. Precludes importation of "distilled water."

(2) The C.A.P. is contructed

A. Colorado River water is diverted to Phoenix and Tucson.

B. Phoenix and Tucson grow "into" the new water supply.

(3) The salinity of the Colorado River increases below the C.A.P. diversion by nearly 50%

A. Holders of "present perfected rights" and Indian tribes cannot use the more saline waters for any purposes.

B. Mexican users suffer the same water quality deterioration.

(4) Upper basin uses have increased

A. Water supply to the C.A.P. is reduced.

B. Phoenix and Tucson revert to drawing ground-water at an even greater rate than before.

Without water augmentation the C.A.P. is illegal. The end result of its construction will be much greater damage to the economy of the Southwest than no project at all.

The problem faced by the Pacific Southwest is a cultural problem which must be faced by the entire nation. Unfortunately, the solution is a major shift from the value premises held by Americans to a new set of values in which economic growth projections and the need to expand cities and industries at an ever-increasing rate must lose their priority. The Colorado River Basin Project Act looks at resource use from the ostrich position—head up somewhere, and it's questionable whether the head is really in the ground. All legislation and all Court decisions concerning the water problems of the Colorado River have taken the position that too much water has gone under the dam to do anything thoughtful or constructive. Continuance to apportion the waters of the Colorado along the lines of the 1922 Colorado Compact can only lead to economic and environmental disaster. The solution chosen by the Congress forecloses this very needed reevaluation and contemplates interbasin transfer of water as its ultimate answer. The environmental consequences of a 2.0 maf per year transfer of water into the Colorado River System from any other drainage area are both staggering and frightening. The real need here is for a fresh approach to the problem, not for bigger and better ways to run away from it. The answer is in limitation not im-

portation. The people of the Southwest, from Senators to JAYCEES, must be made aware that unless they throw away the Bureau of Reclamation's growth projections and concentrate on a stabilized need now, they face even more serious consequences from their desire to draw multitudes into an area that cannot support them.

The foreseeable conclusion of the "solution" decided upon by Congress in the Act is the importation of water. No lawsuit to protect Indian water rights to Colorado River water can prevent this. The victory, if any, in securing Indian rights as a priority right over and above that of the C.A.P., would be Pyrrhic at best, in that it would give proponents of importation just the impetus to be successful. Such a conclusion is a gloomy forecast. The chances for success of any alternate approach along the lines of the kinds of social reassessments demanded of the American people would be less than minimal.

4. MEMORANDA AND CORRESPONDENCE RELATING TO CHEMEHUEVI SHORELINE

OCTOBER 2, 1963.

MEMORANDUM

To: Assistant Secretary for Fish and Wildlife and Parks.
From: Secretary of the Interior.
Subject: Recent meeting in Parker, Arizona, with the Indians of the Colorado River.

I have heard from several sources of the excellent presentation given by representatives of the Albuquerque Office of the Bureau of Sport Fisheries and Wildlife to the Indian leaders and government officials assembled recently at Parker, Arizona. I am exceedingly pleased that such a meeting was requested by the Indians, for it provided Interior agencies an unusual opportunity to discuss their plans for the Colorado River with an important segment of the population and landowners along that stream. I hope that other meetings of similar nature will be held in the future.

I am particularly concerned that Fish and Wildlife Service officials keep the Indians of the Fort Mohave and Chemehuevi Reservations informed of all their plans with respect to the Havasu Lake Wildlife Refuge which may in any way affect the development of these two large land areas. It should be kept in mind that much of the Refuge is located in an area that once belonged to the Indians and that the establishment of the Refuge on lands originally acquired for reclamation purposes has affectively isolated parts of both reservations from access to the Lake and, to some degree thereby, reduced the value of reservation lands.

It is my understanding that the Chemehuevi Indians indicated an interest in obtaining concession rights at certain locations within the Refuge on their side of the lake and it is my wish that they be given preference over other potential concessioners in this regard. The Fish and Wildlife Service should be prepared to work with tribal leaders and representatives of the Bureau of Indian Affairs in planning such concessions, subject always, of course, to the understanding that wildlife values will not be diminished by their operation.

I also am interested in seeing some arrangements made to permit the Ft. Mohave Indians access to the Refuge on their side of the Lake for purposes not inconsistent with those for which the Refuge was established. The Topoc Marsh is an area of interest to many lovers of the out-of-doors in my own state of Arizona and elsewhere and I should like for the Indians to have an opportunity to establish on their own lands commercial enterprises which can serve the needs of those who may wish to approach the Marsh from the land side. I agree with the statements of Fish and Wildlife Service officials at the Parker meeting that additional concessions within the eastern part of the Refuge may be unwise at this time, but I would urge you to permit the Ft. Mohave Indians a preference similar to that of the Chemehuevi in the event future concessions are authorized.

In many respects, the good will and cooperation of the Indians is a critical factor in our attempts to transform the Lower Colorado River into one of the most exciting outdoor recreation and wildlife areas in the United States. I regret that we did not involve them more thoroughly in our planning at the outset, but there is still time and I hope we will all make the most of it.

STEWART L. UDALL,
Secretary of the Interior.

CHEMEHUEVI INDIAN TRIBE,
Parker, Ariz.

RESOLUTION

Resolved, That the Special Committee for Chemehuevi Affairs hereby directs its attorneys, California Indian Legal Services, to notify the representatives of the Bureau of Indian Affairs and other appropriate officials that the Chemehuevi Indian Tribe is of the opinion that the Bureau has neglected, and is continuing to

neglect, its trust responsibility to protect and preserve the Chemehuevi Indian Reservation, specifically including, but not limited to, the instances set forth below:

1. The Bureau of Indian Affairs has not *marked the boundaries* of the Chemehuevi Reservation despite the fact that many *non-Indians* have been and now are *trespassing* on it. On November 23, 1968, and again on June 14, 1969, the Special Committee for Chemehuevi Affairs called upon the Bureau to survey and mark the boundaries of the reservation with appropriate signs. The Bureau has failed to take action.

2. In November, 1968, and again in May, 1969, the Bureau of Indian Affairs was asked for an *accounting of the assets* of the Chemehuevi Indian Tribe. These requests have not been answered.

3. In August, 1968, a *fence was placed on the Chemehuevi Reservation* by the Bureau of Fish and Wildlife, cutting off access to the water by the Chemehuevi Indians. The Bureau of Indian Affairs has done nothing to protest this action, and to take necessary action to protect and preserve the shoreline for the benefit of the tribe.

4. On July 19, 1969, a resolution was passed by the Special Committee for Chemehuevi Affairs stating the Chemehuevi Indian Tribe desires to be recognized by the United States government as a legal entity and calling upon the Secretary of the Interior to hold an election of the Chemehuevi people to approve or disapprove the Constitution and By-Laws adopted by unanimous roll call vote on May 10 1969. The Secretary of the Interior has failed to act.

5. On July 19, 1969, a resolution was passed requesting the Colorado River Agency to investigate a *resort* known as Havasu Palms, which has been *operating on the Chemehuevi Reservation under a revocable permit* from the Bureau of Indian Affairs. The permit expired in February, 1968. The investigation was to ascertain the income; the number and quality of permanent structures on the Chemehuevi Reservation; the amount of reservation land which is being occupied; and the condition and location of the road leading to the resort. The results were to be given within 30 days to the Special Committee for Chemehuevi Affairs. On September 20, 1969, two months from the date of the request, a representative of the Colorado Agency stated to the Special Committee that the Bureau of Indian Affairs did not yet have a report ready.

6. In July, 1969, the Special Committee for Chemehuevi Affairs was advised that the time certificates in the sum of almost one million dollars (representing the undistributed proceeds of a judgment awarded by the Indian Claims Commission) would expire the following month, and the desires of the Special Committee with respect to *reinvestment* were solicited. The Special Committee, on July 19, 1969, passed a resolution setting forth its desires and the reasons therefor. The resolution also directed the Bureau of Indian Affairs to consult with the attorneys for the Special Committee in carrying out the instructions of the Special Committee. To this date the Bureau has failed to consult with the attorneys for the Special Committee on this matter, and a representative of the Colorado River Agency has stated publicly that the Agency does not know the status or whereabouts of the funds.

7. The Phoenix Area Office has, in the past, approved leases and permits on the Chemehuevi Reservation which did not give adequate income to the tribe; and which were not commensurate with the value of the land and the purpose for which the permits were issued.

8. The abovementioned acts of negligence may, in part, be attributed to the attitude of the Superintendent of the Colorado River Agency. The Superintendent stated, at a staff meeting on September 8, 1969, and at other times and to other persons, that he does not wish to become involved in Chemehuevi political matters. A portion of Chemehuevi political matters concern the protection and preservation of the reservation, which are trust responsibilities. There is no other person at the Colorado River Agency who has authority to discharge the trust functions delegated to the Superintendent.

The Special Committee is especially concerned about the negligence of the Colorado River Agency, the Phoenix Area Office, and the Central Office, because the tribe is in the process of organizing, and is not itself yet able to exercise the necessary powers to protect and preserve the Reservation;

The Special Committee for Chemehuevi Affairs believes that under the circumstances the Colorado River Agency, Phoenix Area Office, and Central Office of the Bureau of Indian Affairs is required to allocate the necessary funds and personnel to insure that that trust responsibility is fully discharged; and

The Special Committee for Chemehuevi Affairs, as the interim governing body, hereby gives notice that the Colorado River Agency, the Phoenix Area

Office, and Central Office of the Bureau of Indian Affairs will be held accountable for any and all dereliction of its trust responsibilities.

The foregoing resolution was passed by unanimous vote of the Special Committee for Chemehuevi Affairs at a regular meeting held in Parker, Arizona, on September 20, 1969.

JESUS T. ESQUERRA, *Chairman,*
GEORGIA LAIRD CULP, *Secretary-Treasurer.*

CALIFORNIA INDIAN LEGAL SERVICES,
Escondido, Calif., March 23, 1971.

Re Chemehuevi Shoreline.
Mr. JAMES FIELDING,
Bureau of Sports Fisheries and Wildlife,
Department of Interior, Washington, D.C.

DEAR MR. FIELDING: It has now been one and one half months since the officers of the Chemehuevi Indian tribe and myself met with you in your office in Washington, D.C. At that time the tribe suggested a resolution of the shoreline question with your agency which would incorporate the following:

(*a*) The tribe would establish a tribal wildlife reserve and irrevocably dedicate for fish and wildlife purposes all tribal lands in sections 26, 31, 35 and 36 together with tribal lands in the northern half of section 6 at the north end of the Chemehuevi Indian reservation which lands would be combined with lands in those sections now administered by your agency. All of these lands would be administered by the Chemehuevi Indian tribe as the Chemehuevi Indian Wildlife Refuge with the assistance and cooperation of the Bureau of Sports Fisheries and Wildlife;

(*b*) The Bureau of Sports Fisheries and Wildlife would in so far as practicable, hire and/or train one or more Chemehuevi Indians in Fish and Wildlife management;

(*c*) The Bureau of Sports Fisheries and Wildlife would assist the Chemehuevi Indian tribe in preparing a final master plan which would, to the maximum possible extent, protect and preserve the shoreline from commercial and other development inimical to fish and wildlife considerations.

(*d*) The Bureau of Sports Fisheries and Wildlife would relinquish formal control over all lands which it now administers adjacent to the Chemehuevi Indian reservation.

The reason the tribe made this suggestion is that the southern portion of the present "Wildlife Reserve" is not, in fact, suitable for that use. There is little or no wildlife there, and pressure for recreational uses from the ever increasing population on the Arizona side of Lake Havasu make it impossible as a practical matter to control this area of the "Reserve." Further, the Chemehuevi Indian Tribe desires to locate housing and other non-commercial facilities adjacent to these southern portions of the present "Reserve" and the tribe must have access to the lake. There is one other factor: The tribe believes that the flowage easement which it granted for the construction of the Parker Dam did not divest it of title to shoreline of the lake, and accordingly, the presence of a barbed wire fence which keeps the tribe from access of the water is viewed by the tribe with some hostility.

Placing the question of technical title to one side, it is evident that the Chemehuevi Indian tribe is extremely anxious to preserve a substantial portion of its reservation in a natural condition and to promote a tribal fish and wildlife refuge. There is, therefore, no reason for the tribe and your agency to have any dispute, for the interests of the tribe and your agency can be perfectly well reconciled along the lines which the tribe has suggested.

At our meeting in Washington, you indicated agreement with the concepts which were advanced but suggested that the tribe meet with members of your agency in the field to discuss in detail the feasibility of the tribe's proposal and the means for its implementation. That meeting occurred on Tuesday, March 16, 1971 on the Chemehuevi Indian Reservation. I believe it would be helpful to summarize the discussion which occurred at that time.

The United States Fish and Wildlife Service was represented by Mr. Bill Nelson and Mr. Marcus Nelson from Albuquerque, Mr. Blayne Graves from Needles and Mr. L. D. Ortega of the Albuquerque Field Solicitors Office. Six of the nine members of the Chemehuevi Tribal Council (including all three officers) together with several tribal members and myself were present on behalf of the Chemehuevi Indian Tribe.

We were surprised to find that from the outset your staff seemed to have little interest in determining whether the suggestions made by the Chemehuevi Tribe were reasonable or desirable; rather, the approach was essentially negative and all discussion centered on supposed reasons why the Chemehuevi's proposal could *not* be accomplished. Your representatives raised the following objections:

1. That the Bureau of Fish and Wildlife had no authority to transfer land—the most that could be granted was a temporary use permit;
2. Conservation groups such as the Sierra Club would object to any alteration in the status of lands set aside for Fish and Wildlife purposes;
3. The Bureau of Fish and Wildlife alone can patrol the shoreline of Lake Havasu and assure that Fish and Wildlife objectives are preserved;
4. Although the lower (southern) portion of the present wildlife refuge is not now the most desirable area for a fish and wildlife preserve, the silting action of the Colorado River will in the future make those lands invaluable for wildlife purposes;
5. The preservation of all existing lands under the jurisdiction of the fish and wildlife service will enhance the economic value of the Chemehuevi Indian Reservation;
6. In all events, the fish and wildlife service can not take any action or make any commitments or do anything at all without consulting agencies of California and Arizona and making thorough studies and reports.

The tribe's response to each of these points may be summarized as follows:

1. *Authority to transfer land.*—We are not certain whether or not the Secretary of Interior has authority to transfer land in the manner proposed by the Tribe. The Tribe has obtained a commitment from its local Congressman and from the two Senators for California that in the event additional authority is necessary, that authority will be sought and obtained. Surely, this matter can be worked out.

2. *Conservation groups would object.*—The Sierra Club has recognized the interest of Indian Tribes in conservation, fish and wildlife and has established its own subcommittee on Indian matters to assist Indian people and Indian Tribes in conserving their own natural resources. The establishment of a Tribal wildlife refuge and the irrevocable dedication of substantial additional acreage for wildlife purposes will, in all probability, receive the overwhelming support of conservation groups.

Your representatives responded that there was a *qualitative* difference between shoreline wildlife areas and backland wildlife areas and that it was more important to keep shoreline areas intact. The Tribe does not disagree, but an on site inspection makes it clear that your agency has been unable and is unable to preserve the southern portion of the "reserve" from inundation by sports enthusiasts from Lake Havasu City. The Tribe indicated its willingness to work with your agency in developing its master plan in a manner which would preserve the integrity of the shoreline.

3. *The fish and wildlife service can patrol best.*—This matter breaks down into two parts: (1) Patrolling of the water, and; (2) patrolling the land. It is absurd to think that an employee of the Fish and Wildlife Service can patrol *land* along the shoreline better than a properly trained Chemehuevi Indian employee of the tribal wildlife preserve who resides on his own reservation. It might be possible to work out an arrangement by which that same employee could be given authority to patrol a section of the river as well. In all events, the tribe is quite willing to discuss an arrangement by which it will give the Fish and Wildlife Service the authority to patrol the river in the areas in which it is now patrolled—if such authority should be necessary. The tribe emphasized that it is concerned with the land, not the water and further that it does not have any plans inconsistent with Fish and Wildlife purposes.

4. *Silting action will make the southern portion more desirable.*—It is not at all clear whether, when or if the silting action projected by your representatives will occur. It appears, quite frankly, that there is some element of wishful thinking in their projections. In all events, it is clear that the recreation minded population which speeds up and down the lake and camps all over the shoreline in ever-increasing numbers will probably offset such enhanced wildlife values as may accrue. At the same time it is perfectly clear that the irrevocable dedication of the substantial areas of tribal lands for fish and wildlife purposes will add considerably to the efforts which your agency has made to retain susbtantial bodies of land for fish and wildlife purposes, and this tribal reserve can yield substantial wildlife values immediately.

5. *Retention of jurisdiction by your agency will enhance economic value of Indian land.*—Indian people have always had a great interest in conservation and ecology, and the Chemehuevi Indian tribe is no different. The tribe sees no reason why the establishment of a tribal wildlife reserve will not have beneficial results for the

value of its remaining lands, and in all events, the tribe is prepared to take such risks as may be incumbent upon it.

6. *Prolonged consultation necessary.*—You have remarked publicly and privately that if a government agency is interested and determined to prevent certain action, there is much it can do to delay, stall, and obstruct. Tribal members present at the meeting on March 16 were skeptical of the need for prolonged consultation, studies and reports; however, to the extent that these matters must be cleared with other agencies having jurisdiction, the tribe pledged its willingness to expedite any of these matters and requested that a tribal representative be included in such meetings as are absolutely necessary.

One of the matters discussed at the meeting was the tremendous symbolic importance which the Chemehuevi Indian tribe attaches to the beneficial control of what it has always regarded as its land. We tried to explain to your representatives that the tribe has always regarded the fence which your agency constructed along the shoreline as an affront to its integrity. The tribe's proposal to your agency is intended to be consistent with the integrity of the tribe as well as to promote the Fish and Wildlife values which the tribe shares with you.

We discussed one further point; the Chemehuevi Tribe and the Chemehuevi people are unusually competent, energetic and capable. The tribe has been disorganized for many years and has only recently come together, resolved its factional disputes, and obtained official recognition from the Secretary of the Interior. Several tribal members have already moved back to the reservation and many more plan to move in the near future.

Some tribal members are well-educated and have had successful careers in business or in the professions. Others are skilled workmen having specialized skills of various kinds, while still others have no specific training or skills. Most of the Chemehuevi people who are working together for the tribe share the single desire to build their reservation in a beautiful and meaningful way which will preserve and enhance its natural beauty insofar as possible and provide an economic base for the welfare of the tribe. The Chemehuevi have received little assistance from the BIA. For example, when the BIA told the tribe that it could not survey homesites for at least two years because funds were not in the bureau budget, the tribe immediately hired a crew of its tribal members, some of whom are trained surveyors and, at tribal expense, completed the necessary survey work for homesites within one month. When the tribal officers were told that it would be impossible to work out agreement with all the agencies of the Department of Interior with respect to the shoreline, the tribal officers boarded a plane for Washington and met with you and several other officials. The tribe is eager to move forward in a sensible way, and anxious to expedite the resolution of the shoreline question. Accordingly, we shall telephone you directly in a few days to discuss the present status of this matter.

Please accept our apologies for the length of this letter. Thank you very much for your assistance.

Very truly yours,

DANIEL M. ROSENFELT.

TUTTLE & TAYLOR, INC.,
ATTORNEYS AT LAW,
Los Angeles, Calif., October 5, 1971.

Re Chemehuevi Shoreline.

MR. HARRISON LOESCH,
Assistant Secretary, Department of the Interior,
Washington, D.C.

DEAR SECRETARY LOESCH: This is to confirm that representatives of the Chemehuevi Indian Tribe will be meeting with you and other representatives of the Department of the Interior on October 22, 1971, in Washington, D.C. to discuss the pending negotiations relating to the transfer by the Department to the Tribe of control over the disputed Shoreline lands along the California side of Lake Havasu.

As you are aware, the stated purpose of the upcoming meeting is to discuss the agreement which has been drafted to accomplish the said transfer of control and, more particularly, to discuss the question of what land will be the subject of this agreement.

In order to put this issue into proper focus, we believe it would be helpful to all concerned to briefly summarize the history of the Shoreline dispute and the most recent attempt to reach a negotiated settlement of this matter.

THE BACKGROUND OF THE SHORELINE DISPUTE

The Chemehuevi Reservation was established in 1907 and at that time its eastern boundary was the Colorado River. In the 1930's the Metropolitan Water District of Los Angeles proposed the construction of Parker Dam on the Colorado River, and this dam was expected to flood certain portions of the Chemehuevi Reservation. Accordingly, in 1940, Congress authorized the appropriation of such Tribal land, to be designated by the Secretary of the Interior, as may be necessary in aid of the construction of the Parker Dam project. Citing the authority of the Act of 1940, the Secretary of the Interior designated, and subsequently purported to take, certain lands within the Reservation for use in the Parker Dam project and the Tribe received compensation therefor of approximately $100,000.

The land purportedly taken by the Secretary included more than the land which was flooded by the dam subsequently constructed. The Department of the Interior has asserted that the taken lands include the entire Shoreline of Lake Havasu which is adjacent to the Reservation. The northerly portion of this Shoreline strip has been administered by the Bureau of Sport Fishery and Wildlife and has been used as a wildlife refuge, while the southerly portion has been administered by the Bureau of Land Management, which Bureau has leased parts thereof to private concessionaires, who maintain and operate trailer parks, campgrounds and other resort facilities, and certain parts thereof to private individuals who have constructed homes on the immediate Shoreline of the Lake. In addition, the subject Bureaus have erected a barbed-wire fence between the Reservation and the Shoreline thereby preventing the Chemehuevi from gaining access to the waters of the Colorado.

The ultimate effect of the various actions of the Department has been: (i) to separate the Chemehuevi Indian Reservation from the Colorado River and thereby, impede, if not altogether prevent, all viable economic development on the Reservation; (ii) to encourage non-indian entrepreneurs to operate facilities, and non-indian individuals to construct residences, on the Shoreline of Lake Havasu in a manner which is not consistent with the long-run best interests of the Tribe and may not be in the long-run best interests of the public in general; (iii) to create an attitude of distrust and skepticism regarding the Department of the Interior in the minds of many members of the Tribe; and (iv) to create inter-Bureau disputes within the Department thereby aggravating the already serious conflict-of-interest problems faced by the Department.

ATTEMPTS AT NEGOTIATIONS

Both before and since the official recognition of the Tribe in 1970, the Chemehuevi have consistently had as one of their primary goals the restoration of the Shoreline. The basic alternatives open to them have been litigation, legislation and negotiations. Although the Tribal members have not always been of one mind as to which approach was the most desirable, the Tribe in late 1970 decided to test whether the matter could be resolved amicably through negotiation.

In February of 1971 a delegation from the Tribe met with the various Bureaus which have an interest in the Shoreline to ascertain whether any of the Bureaus had any reason to dispute the claim of the Tribe to title to the Shoreline. At those meetings the representatives of the Tribe were led to believe that the Department was in favor of permitting the Tribe full access, occupancy and beneficial use of the entire Shoreline, provided that the Tribe make the following undertakings:

(1) To honor all existing permits and concessions granted by the Bureau of Land Management;

(2) To abide by all regulations promulgated by the Bureau of Reclamation with respect to preserving the Lake Havasu environment from pollution; and

(3) To irrevocably dedicate four sections of the Reservation as a wildlife refuge and to work with the Bureau of Sport Fishery and Wildlife in connection therewith.

The Tribe consented to all of the above conditions and under cover of letter dated February 25, 1971, the Bureau of Indian Affairs circulated to all of the interested Bureaus a Memorandum of Understanding embodying the principles agreed upon at the meeting, and the BIA suggested that the Solicitors Office commence the documentation to implement the Memorandum. Of the four Bureaus named as parties to the Memorandum, it was executed only by the BIA.

Following the February meeting the Tribe watched as the principles promulgated in the Memorandum began to erode and disappear altogether. At subsequent

meetings held in Washington, D.C. and Phoenix, Arizona, the Tribe was informed, in the following sequence, that:

(*a*) The Department had come to the conclusion that it could not convey title to the Shoreline to the Tribe but that the Department was willing to discuss a "lease" of the land;

(*b*) Since the Department could not convey title to the Shoreline, and if the Tribe agreed to lease the Shoreline, the Tribe would not be permitted to use any of its adjudicated rights to Colorado River water on the Shoreline; and

(*c*) The Department had tentatively concluded to lease only 3½ miles, rather than the entire 21 miles of the Shoreline to the Tribe.

Notwithstanding the fact that the original Chemehuevi goals had long been cast aside by the Department; notwithstanding the fact that the negotiations had dragged out for over eighteen months; and notwithstanding the fact that the Tribal council has been under extreme pressure from the Tribal members to commence meaningful economic development on the Reservation; the Tribal council of the Chemehuevi Indian Tribe is committed to determining whether or not negotiation of the Shoreline issue can be a workable alternative for the Tribe. It is because of this commitment that the Tribe has requested the forthcoming meeting with you and other representatives of the Department.

In light of the importance of the Shoreline issue to the Tribe, I have taken the liberty of inviting representatives of Senators Cranston and Tunney and Congressman Pettis to attend the October 22 meeting.

I am sure I speak for all members of the Tribe in hoping that the upcoming meeting will be the occasion for finally resolving the Shoreline issue in a mutually satisfactory manner.

I look forward to meeting with you on October 22.

Very truly yours,

MARK SCHAFFER.

TUTTLE & TAYLOR, INC.,
ATTORNEYS AT LAW,
Los Angeles, Calif., October 26, 1971.

Re Chemehuevi Indian Tribe.

Senator EDWARD KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: Speaking on behalf of the Chemehuevi Indian Tribe, I would like to express the Tribe's great appreciation for your having Tom Sussman attend a metting with Assistant Secretary of the Interior Loesch, on Friday, October 22, 1971, regarding the Lake Havasu shoreline.

The Tribe was very pleased with the progress made at that meeting and enclosed herewith is a copy of the Memorandum of Understanding that was prepared and executed to evidence the understandings reached at the meeting. As you will note, the Department of Interior has agreed in principle to the unconditional turning over of approximately 18 miles of the shoreline to the Tribe, and upon the consent of the Bureau of Sport Fisheries and Wild Life, the Department has also agreed to turn over the balance of the shoreline to the Tribe.

Although Friday's meeting marked an important milestone in the Tribe's efforts to create economic opportunity for its members on the reservation, much more work needs to be done, and the Tribe looks forward to your continued assistance and support.

Very truly yours,

TUTTLE & TAYLOR,
By MARK SCHAFFER.

Enclosure.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C.

MEMORANDUM OF UNDERSTANDING RE MEETING

On October 22, 1971 a meeting was held between the Executive Committee of the Chemehuevi Tribal Council and representatives of the Department of the Interior. Representing the Department were Assistant Secretary Loesch and representatives of the Bureau of Land Management, Bureau of Reclamation, Bureau of Sport Fisheries and Wildlife, Bureau of Indian Affairs, and the Office of the Solicitor.

It was agreed in principle that the Department and the Tribe would execute an agreement providing for the transfer of the control and use to the Tribe of a strip of land now controlled by the Department beginning at a line somewhat north of Catfish Bay and extending to the south to the southern edge of the Tribe's reservation. The language of this agreement has been the subject of previous negotiations and the parties are in substantial agreement as to its content.

With respect to the land north of the point somewhat north of Catfish Bay subject to the approval of the Assistant Secretary for Fish and Wildlife and Parks, it was agreed that control and use of said land would be transferred to the Tribe provided that the Tribe will retain all wildlife values, do no construction or development within a distance of 300 feet of the shoreline, manage the area for the protection and propagation of wildlife, seek technical assistance and advice from the Bureau of Sport Fisheries and Wildlife in doing so, allow free access thereto by authorized BSFW personnel and otherwise protect and administer said land in its natural state. It was understood that the Tribe would be obligated to maintain the status quo and would not be obligated to undertake new or additional activities.

Secretary Loesch agreed to take up the matter with Assistant Secretary Reed as soon as possible and attempt to secure his consent to the arrangement.

HARRISON LOESCH,
Assistant Secretary of the Interior.
RALPH ESQUERRA,
Chairman, Chemehuevi Indian Tribe.

5. MEMORANDUM ON COCOPAH ACCRETION LAND, JAN. 23, 1970

MEMORANDUM

To: Cocopah Tribal Council.
From: F. David Grabill. California Indian Legal Services.
Re: CoCopah accretion land.
Date: January 23, 1970.

By resolution of the Cocopah Tribal Council on August 19, 1969, you have requested Mr. Robert S. Pelcyger of California Indian Legal Services to look into the question of whether land added to the east bank of the Colorado River by accretion should be included within the boundaries of the Cocopah Indian Reservation.

I. FACTS

The Cocopah are a small tribe residing for the most part in the southwest corner of Arizona. By Executive Order of September 27, 1917, two parcels of land (then totaling about four hundred acres) were set aside as the Cocopah Reservation:

"It is hereby ordered that the west half of the south-east quarter of section 12 and the west half of the north-east quarter of section 13, Township 10 south, Lots 2, 4, 5 and 6 together with such vacant, unsurveyed and unappropriated public lands adjacent to the foregoing described subdivisions and *between the same and the waters of the Colorado River* as would, upon an extension of the lines of existing surveys, constitute fractional portions of the north-east quarter and north-west quarter of section 30, Township 9 south of range 24 west of the Gila and Salt River Meridian, Arizona be and the same are hereby withdrawn and set apart for the use and occupancy of the Cocopah Indians, subject to any valid prior existing rights of any person or persons thereto, and reserving a right of way thereon for ditches or canals constructed by the authority of the United States." (Executive Order No. 2711, September 27, 1917) (Emphasis added).

Since this land was set aside, the Colorado River has gradually shifted its channel westward, and over eight hundred acres of accretion land now lie between the second parcel described in the order and the river. (See exhibit "A").

The Bureau of Indian Affairs has vacillated in its interpretation of whether the accretion land belongs to the reservation, or is in the public domain. In a 1955 Solicitor's Memorandum the question of title to the lands was decided against the Cocopah on the grounds that the drafter of the order knew that there was a sizeable portion of unsurveyed accretion land between Section 30 and the river, and to include this under the order would make the language "fractional portions of . . . Section 30" superfluous. (Solicitor's Opinion M–36275, Apr. 15, 1955). Upon the same evidence examined less than ten years earlier, the Regional Counsel for the Bureau of Indian Affairs had arrived at the opposite conclusion. (Letter of March 25, 1948 from Regional Counsel A.D. Sanford to Superintendent of the Colorado River Agency, B.I.A., as quoted in Memorandum of February 26, 1954 from W.J. Truswell, Area Counsel to E.M. Gelvin, Area Director, B.I.A.,). (See Exhibit "B".)

An additional factor, not apparently considered in the Solicitor's Memorandum, is that it was not clear that land in and to the west of Section 30 was within the international boundary of the United States at the time the reservation was established. The river had moved westward, but the International Boundary Commission had not adjusted the survey of the boundary line to reflect the shift. Nor had they ruled whether the shift had taken place by accretion, which under the Convention of March 1, 1889, (26 Stat. 1912) they must find if the boundary was to move west with the channel of the river. Much of the land in Section 30, and any land between it and the river was technically "no man's land" at the time when the Executive Order was issued. See Opinion of April 17, 1918, 46 I.D. 461.

II. QUESTION PRESENTED

Are the words "between the same and the waters of the Colorado River" words of description or limitation?

If these words are words of "description" they merely describe the location of the land set aside under the Executive Order of 1917. If they are considered words of "limitation", then they relate to the *amount* of land set aside.

The resolution of this issue hinges first of all on the intent of the framers of the Executive Order. If, at the time the Order was issued, no substantial accretion land existed west of Section 30, then the reservation would include all the land up to and including the bed of the river, and any accretions to the banks of the river would vest in the reservation under the doctrine of *Jefferies* v. *East Omaha Land Co.*, 134 U.S. 178, S.Ct. 518, 33 L.Ed. 872 (1889). In *Jefferies*, about the same time the patent was issued, accretions began to form to the boundary of the patent along the Missouri River, and the Court held the patent "passes the title of the United States to the land, not only as it was at the time of the survey, but as it is at the date of the patent, so that the United States does not retain any interest in any accretion formed between the survey and the date of the patent." Id. at 195.

At the time of the Executive Order here, however, there appears to have been some land formed to the west of Section 30. A Bureau of Reclamation flood control levee had been constructed in 1906 just west of the Section and it was apparently still in existence in 1917. (See exhibit "C"). A Bureau of Reclamation Yuma Irrigation Project Map dated 1949 shows the meander line of the Colorado River in 1915 running through what is now a Section 25 several hundred feet west of section 30. In view of the wide fluctuations which this map shows in the meander line over relatively short periods of time, it is not conclusive of the course of the river in 1917. Furthermore, at least one court has held that a patent bordering on a meander line passes title to substantial accretions to the line even though in existence for sometime prior to the date of entry and patent. *Oberly* v. *Carpenter*, 67 N. Dak. 495, 274 N.W. 509 (1937); see 59 I.D. 415 (1947). The theory in *Oberly* was that the general rule that the boundary line of lots along a waterline is the waterline itself and not the meander line controlled, since no reservation was stated in the patent, and the meander line as it existed at the time of the survey makes no difference where accretions have subsequently been formed. There was language in the *Oberly* patent specifying the exact acreage of the allotment granted to him by the government. This was held to be not a "reservation" of the accretion land by the government. The language in the Executive Order ("as would . . . constitute fractional portions of . . . Section 30 . . .) could not therefore be construed as a reservation of the accretion land from the grant to the Cocopah.

Even if there was an unascertained amount of accretion land between the river and Section 30 at the time of the Executive Order, if the intent of the Order was to extend the reservation to the River, that intent is controlling. If Section 30 was land locked at the time of the Order, the words, ". . . between the same and the waters . . ." become superfluous if the reservation was intended to be limited to the Section, even though the survey of its western boundary had not been made. Other words would have been more appropriate had this been the intent of the Order. Indeed, complete deletion of the phrase would have accomplished this intent. Since it must be assumed the phrase was not intended to be superfluous, other constructions must be examined.

The framers of the Order were presumably familiar with the broad language of *Jefferies, supra.* Several decisions of the Department had given full effect to this broad language. See *Harvey M. La Follette,* 26 L.D. 453 (1898); *Gleason* v. *Pent,* 14 L.D. 375 (1892); *Lewis W. Pierce,* 18 L.D. 328 (1893). If viewed in light of these decisions, the language of the Order loses its ambiguity:

"It is clearly established that lines run along permanent bodies of water are run as meander lines, and that the water itself, and not such meander line constitutes the true boundary of the land to be sold, that all accretion after the date of the survey upon which the sale is made and prior to the date of the patent passes under such patent, and that the plat of public lands when referred to in a patent becomes a part of such instrument and is to be considered in determining what land is sold . . . Applying the law declared in the decisions . . . , it must be held that the survey of 1821 and plat included all the land between the western line of section 10 and the waters of Lake Michigan, that Kinzie by his purchase, took all

the land included in the north fraction of the section, including accretions thereto prior to his patent, and that upon the issuance of that patent the government ceased to be a riparian proprietor and is therefore not entitled to subsequent accretions." *La Follette, supra* at 473–474.

This interpretation was subsequently narrowed by the Department's Instructions of April 17, 1918, 46 L.D. 461 on the grounds, *inter alia*, that "to extend such *entries*, to all the lands formed by accretion would increase their area beyond the 160 acres limited by law." (Emphasis in original). The Cocopah reservation was, of course, established prior to these Instructions and not subject to any such limitation. The Order itself did not limit or specify the acreage included in the grant as is customary. See *Madison* v. *Basart, supra.*

Assuming the framers were familiar with the above decisions, both judicial and administrative, and assuming they were aware that Section 30 was *in esse* as a whole section, their choice of words makes no sense whatsoever if the accretion land is held not to pass under the Order. It should be noted that the President had no authority to survey or dispose of land west of the International Boundary as last surveyed in 1893–1894 until such land had been declared to be accretion land by the International Boundary Commission pursuant to the Convention of March 1, 1889 (26 Stat. 1912). While this last boundary survey has not been matched to the survey of 1874 from which the plat lines of Section 30 were derived, it appears that the Section was riparian under both. (See exhibit "D"). The wording of the Order served to set aside all the land along the boundary, and the government ceased, as of that time, to be a riparian owner. If the language "as would . . . constitute . . . portions of . . . Section 30" had been omitted, the President would be making a unilateral determination that the land west of the last boundary survey belonged to the United States. This would have been a breach of the Convention, and beyond his authority. The construction of a flood control levee on lands west of the 1893–1894 boundary by the Reclamation Bureau in 1905–1906 at most indicates that the Bureau was of the view the lands had been formed by accretion and would, upon survey by the Commission, be determined to be within the United States. This was no violation of the terms of the Convention. If, then, it were not intended to include these accretions in the grant to the Cocopah, it is clear that more specific language would have been used in the Order to exclude them from the reservation.

The Executive Order of 1917 is at worst ambiguous. Circumstances surrounding the grant to the Cocopahs support the view that the reservation includes the accretion land. Courts in such situations have ruled that the law should be construed in favor of the Indians. *Alaska-Pacific Fisheries Co.* v. *United States*, 248 U.S. 78 (1918), *Choate* v. *Trapp*, 224, U.S. 665 (1912). Furthermore, the United States, as Trustee of the lands for the Cocopah, has a duty to construe the grant, where ambiguous, in favor of the beneficiary. The latest construction given the Executive Order by the Solicitor (Solicitor's Opinion M–36275, April 15, 1955) has the clear and reprehensible effect of enrishing the trustee at the expense of the beneficiary. This fact alone warrants reconsideration and reversal of the decision.

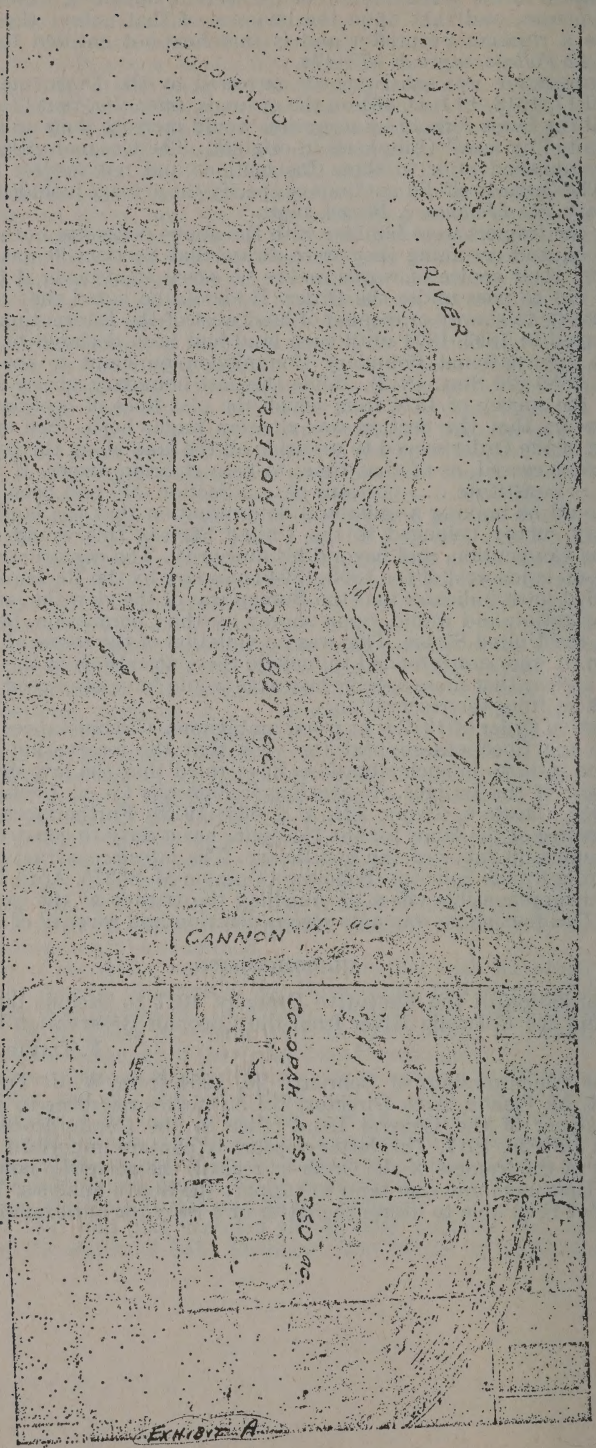
III. CONCLUSION

The interpretation of the Executive Order of 1917 to exclude lands between Section 30 and the Colorado River from the Cocopah Reservation is erroneous.

F. DAVID GRABILL.

(Note: The Memorandum of February 26, 1954 from W. J. Truswell, Area Counsel to R. M. Gelvin, Area Director, B.I.A., makes reference to a letter from the Commissioner of the General Land office to the Commissioner of Indian Affairs dated July 26, 1917. This letter appears to contain important information on the intent of the framers of the Order as regards the accretion land. The parts it quoted in that memorandum tend to support the above analysis. To date, the Bureau has not been able to locate the letter or a copy for our examination).

EXHIBIT A



MEMORANDUM

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., April 15, 1955.

To: Commissioner of Indian Affairs.
From: Solicitor.
Subject: Title to accretion lands adjacent to the Cocopah Indian Reservation, Ariz.

The Director of your Area Office at Phoenix has presented the question of the ownership of an area of accreted land lying between the Cocopah Indian Reservation, Arizona and the waters of the Colorado River. The reservation was created by an Executive Order on September 27, 1917 which reads:

"It is hereby ordered that the west half of the southeast quarter of section twelve and the west half of the northeast quarter of section thirteen, township, ten south, lots two, four, five, and six, together with such vacant, unsurveyed and unappropriated public lands adjacent to the foregoing-described subdivisions and between the same and the waters of the Colorado River as would, upon an extension of the lines of existing surveys, consitute fractional portions of the northeast quarter and the northwest quarter of section thirty, township nine south of range twenty-four west of the Gila and Salt River meridian, Arizona, be, and the same are hereby, withdrawn and set apart for the use and occupancy of the Cocopah Indians, subject to any valid prior existing rights of any person or persons thereto, and reserving a right of way thereon for ditches or canals constructed by the authority of the United States."

At that time, lots 2, 4, 5 and 6 were bordered on the west by the meander line of the Colorado River as shown by a public land survey made in 1874. Prior to the date of the order establishing the reservation, it was recognized that the river channel had already shifted westward leaving a considerable area of accreted land between the river and what would have been the western line of section 30 had the public survey lines been extended.

Part of the land covered by the Executive Order was within what was known as the Farmers Banco No. 501 claimed by General Higinio Alvarez, a Mexican citizen. His claim later came before the International Boundary Commission of the United States and Mexico in 1926 and it was determined that dominion and sovereign jurisdiction over the area had passed to the United States (IO File 8717–26). When creating the Cocopah Indian Reservation on a part of this unsurveyed area the United States could limit the reservation boundary to include all or any part of the area. (56 Am. Jur. Sec. 481). See also *Jones* v. *Johnston*, 18 How, 150. *Producers Oil Co.* v. *Hanzen*, 238 U.S. 325.

Had it been intended that the rights of the Cocopah Indians should extend all the way from the western boundary of surveyed lots 2, 4, 5 and 6 to the waters of the Colorado River there would have been no occasion for including in the Executive Order the restrictive language defining the western boundary of the reservation to include such land "* * * as would, upon an extension of the lines of existing surveys, constitute fractional portions of the northeast quarter and the northwest quarter of section thirty, township nine south of range twenty-four west of the Gila and Salt River meridian, Arizona". It being known that there was already a sizeable area of accreted land between the river and unsurveyed section 30, this language operated to exclude the accreted land found to be west of section 30 when the survey lines were protracted. To include in the reservation all of the accreted land between the 1874 meander line and the water of the river as it flowed when the reservation was created would be to hold as superfluous and without meaning the above-quoted part of the Executive Order. It must be concluded, therefore, that the Indians have no rights to accreted lands west of the boundary fixed by the Executive Order. See also *Houston Brothers* v. *Grant*, 73 So. 284; *Saulet* v. *Shepherd*, 71 U.S. 502.

J. REUEL ARMSTRONG,
Solicitor.

COMMISSIONER,
BUREAU OF INDIAN AFFAIRS,
Washington, D.C., March 17, 1954.

Attention: Branch of Land.

DEAR SIR: For many years there has been a question in the minds of the Cocopah Indians and others as to whether the Cocopahs are entitled to the accretion land lying to the west of their small reservation.

Area Counsel Truswell has made a rather exhaustive study of this matter and has given me his opinion in memorandum form dated February 26, 1954. I am enclosing the original and one copy of that memorandum. I am also enclosing Exhibits A, B, C, D, E, EE, F, and C as indicated in Mr. Truswell's memorandum to me.

You will note on page 15 that Mr. Truswell recommends that this be submitted to the Central Office for review by the office of the Chief Counsel and the office of the Solicitor. I will very much appreciate this case being referred as recommended so that we may arrive at a final conclusion in the matter. In view of the fact that some of the enclosed exhibits are our only copies, I will appreciate your office keeping them intact.

Very sincerely yours,

RALPH M. GELVIN,
Area Director.

Enclosures

MEMORANDUM

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
PHOENIX AREA OFFICE,
Phoenix, Ariz., February 26, 1954.

To: Ralph M. Gelvin, Area Director.
From: William J. Truswell, Area Counsel.
Subject: Cocopah land accretion matter.

Quite some time ago the above matter was called to my attention. In effect an answer to the following question was requested: Are the Cocopah Indians entitled to the accretion land now farmed by a Mr. Cannon, which said land is part of the accreted land lying between the Reservation and the Colorado River?

FACTS

President Woodrow Wilson, on September 27, 1917, signed the following Executive Order, creating the Cocopah Reservation:

EXECUTIVE ORDER

"It is hereby ordered that the west half of the south-east quarter of section twelve and the west half of the north-east quarter of section thirteen, township ten south; Lots two, four, five and six, together with such vacant, unsurveyed and unappropriated public lands adjacent to the foregoing described subdivisions and between the same and the waters of the Colorado River as would, upon an extension of the lines of existing surveys, constitute fractional portions of the north-east quarter and the north-west quarter of Section thirty, township nine south of range twenty-four west of the Gila and Salt River Meridian, Arizona, be, and the same are hereby withdrawn and set apart for the use and occupancy of the Cocopah Indians, subject to any valid prior existing rights of any person or persons thereto, and reserving a right of way thereon for ditches or canals constructed by the authority of the United States.

WOODROW WILSON.

THE WHITE HOUSE, *September 27, 1917.* (NO. 2711.)"

Administrative Assistant Harry L. Stevens, memorandum to you as Superintendent of Colorado River, on August 5, 1940, stated in paragraph two:

"District Office letter of March 25, 1948, prepared by Douglas Clark, then Regional Land Officer, and signed by L. L. Nelson, states that Executive Order No. 2711, dated Sept. 27, 1917, creating the Cocopah Reservation, is interpreted to mean that the accretion land adjoining Section 30 West to the Colorado River is Cocopah Indian land."

A copy of a letter to you as General Superintendent of the Colorado River Agency from Regional Counsel Allan D. Sanford, Jr., reads as follows in paragraph two:

"It is my opinion that the letter of March 25, 1948, signed by Mr. L. L. Nelson as Acting District Director, which was prepared by Mr. Douglas Clark, then Regional Land Officer, gives the correct status of the lands in question."

Enclosed herewith as Exhibit "A" is a copy of the March 25, 1948 letter. This was obtained from the files of the Area Land Officer.

The accreted land in question is the land farmed by Mr. Carmon and land west to the Colorado River.

RESEARCH

Aerial photographs, United States Reclamation Service, Yuma Project maps, and conversations with those familiar with the area leave no doubt but that it can be proved that the area in question was formed by accretion as distinguished from avulsion. And since the land in question is either reservation or public land, no useful purpose would be served by building up proof of accretion independent of that of the Reclamation Service. The aerial photographs above referred to are attached hereto as Exhibit "B".

A photostatic copy of T. 9 S. R. 24 W. G & S. R. M. by the Surveyor General's Office, dated April 18, 1874, is attached hereto as Exhibit "C". This plat was the current official plat at the time of the Executive Order. A Department of Interior, Bureau of Reclamation map of the Yuma Irrigation Project, dated 1949, reveals however that the 1915 meander line of the Colorado River bordered a Section 25 in an entirely different fractional township to the west of township nine south, range twenry-four west, of the Gila and Salt River Meridian, thus conculsively showing that all of Section thirty in township nine south, range twenty-four west, of the Gila and Salt River Meridian was in existence and fast land in 1915, two years prior to the Executive Order herein being considered. A copy of said map, marked Exhibit "D", is hereto attached. Photostatic copies of other interesting and informative maps are grouped together as Exhibit "E" and attached hereto.

The Central Office furnished me with copies of certain documents from which information can be gained that is essential to a full understanding of the question. The first of such copies, marked Exhibit "EE", is a report from Inspector E. J. Sweet, Jr., entitled "Land for Cocopahs" and dated Fort Yuma, 3–10–17 Land. This report deals with lands wich may be set aside for use of the Cocopah Indians. The land, important insofar as the question involved, is referred to in this report as follows:

"There is another 160 acre tract lying about the same distance north-west of the town of Summerton, near to the Colorado River. This land was once between the levee and the River, but the levee railroad has been now so built as to leave this tract outside of the levee. When such floods as that of 14 months ago shall come again it is possible that this land may be again overflowed, although there is not the danger of the levee breaking below the town of Yuma that there is above . . .".

Quoting again from the Sweet Reportwe find the following:

"Exhibit 'C' herewith is anotler map of the Yuma Reclamation Project whereon is marked the location of these two tracts."

The two tracts referred to in the Sweet Report are shaded and pointed out by arrows, together with words of description. The land with which this memorandum is concerned is referred to as follows:

"One hundred sixty acre tract which might be used for Cocopahs."

This same exhibit, or map, which is numbered 16774, January 1916, Department of the Interior, United States Reclamation Service, Yuma Project, Arizona-California, shows that all of Section thirty is fast land; that the levee and railroad tract are west of Section thirty, and that there is still fast land west of the levee and railroad tract in a different fractional section and township.

Next to be considered are copies of two letters from the General Land Office. The first of which said letters is dated May 19, 1917, and is herewith attached as Exhibit "F". This is a letter to the Commissioner of Indian Affairs from the Assistant Commissioner of the General Land Office. It is in reply to one from the Commissioner of Indian Affairs and, in effect, states that the Assistant Commissioner of the General Land Office knows of no reason why lots two, four, five and six and the north-west one-quarter Section thirty, township nine south, range twenty-four west, Gila and Salt River Meridian, Arizona, should not be set aside by Executive Order for Indian purposes.

The letter dated July 26, 1917, attached hereto as Exhibit "G" returns to the Commissioner of Indian Affairs a draft of an Executive Order withdrawing 402.58 acres of lands in Arizona for the use and occupancy of the Cocopah Indiana.

It is interesting in note that the description used in Exhibit "F" would have assured for the Cocopahs the same acreage—402.58 acres—as that provided for by Exhibit "G". This acreage, of course, far exceeds that requested by Inspector Sweet in his report.

Exhibit "G" refers to the previous letter, and states that the plat of survey of the township in which the land is situated was not examined when the first letter

was written. It further states that the plat of township nine south, range twenty-four west, Gila and Salt River Meridian, Arizona, approved April 18, 1874, is the current official plat of said township, and does not show any land in the north-west quarter of Section thirty of said township. There is considerable discussion of accretion and avulsion. The letter states that, if the north-west quarter of Section thirty has been formed by accretion, then such portion as is contiguous to the unappropriated public lands of the U.S., and which would be included within properly extended boundaries of those lands, is the property of this Government and may be lawfully reserved in the manner proposed by the Commissioner of Indian Affairs. There then follows certain language suggested for an Executive Order. The identical language suggested by the Commissioner of the General Land Office was the language used in the Executive Order issued by President Wilson.

Based upon the above facts the question is squarely presented whether by the above referred to Executive Order the Cocopah Indians take to the present waters of the Colorado River. The Executive Order is apparently susceptible to two divergent interpretations. The first of those interpretations would be that said Executive Order gave everything to the Cocopah Indians between the Colorado River and the subdivisions mentioned. Another, or second interpretation of said Executive Order, would be that the words

". . . upon an extension of the lines of existing surveys, constitute fractional portions of the north-east quarter and the north-west quarter of Section thirty, . . .".

were words not merely of description, but of limitation and that therefore the Indians could not claim any land west of said Section thirty.

LAW

Since there are a number of other accretion matters which will subsequently be called to your attention, the law of accretion will be dealt with here generally.

56 Am. Juris—Waters

Par. 476, Page 891: "Accretion is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water."

Par. 477, Page 894: "It follows from the foregoing that in order to establish title to accretions, the claimant must show that they were formed by deposits against upland owned by him or his granters."

Section 481, Page 896: "Where land fronting on a river or other body of water is conveyed by deed, the right to accretion already attached passes to the grantee, although not specially mentioned, unless it is expressly excepted or reserved, or has previously been conveyed to another. This is true even where the land is described by metes and bounds, if, notwithstanding such description, the stream or body of water is the actual boundary. Thus, where the water and not the meander line of a lake or river is the boundary of land granted by the United States, the grantee takes title to accretions between the meander line and the water. Even though there is no call in the description for the water as a boundary, if the side lines run into the water the owner of the adjacent land will take title to all land added by accretion of reliction. But additions to land by accretion or reliction which are not included within the actual boundaries of a conveyance will not pass thereunder as appurtenant or incident to the land granted."

11 Corpus Juris Secundum, page 572—Boundaries

Par. 30. Meandered Waters:

"*a. Following Meanderings*—The doctrine is well supported that unless, from the terms used in the description of a boundary line running up, down, or with a stream, the intent of the parties is clearly otherwise, such boundary line will follow and be determined by the meanderings of the stream; and the words 'thence with the creek' have been held controlling, as running the line along the meanderings of the creek, as against the general direction 'north 88½ degrees east.'

"*b. Meander Lines*—Subject to qualifications which will appear, the general rule is that meander lines are run not as boundaries of the tract surveyed, but for the purpose of defining the sinusosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey, the stream, or other body of water, and not the meander line as actually

run on the ground, being the boundary, whether the meander line in fact coincides with the shore or not, and whether the course is described as extending to the bank of the stream or to the stream itself; and the rules adoped in the various states as to the particular part of the stream or other body of water forming the actual boundary line apply in the case of land bounded by meandered waters.

"*Qualifications of rule.* The general rule above stated is, however, qualified by the holding that the meander line will be treated as the boundary if the parties to the instrument of conveyance appear to have so intended; public officers in making sales may adopt the meander line as a boundary, and if the meander line is actually or by necessary implication made a boundary of the land sold, such boundary will stand as any other boundary named or described. Further, the general rules has been said to apply only where the distance between the meander line and the actual shore line is comparatively small; so, if a meander line is established at such excessive distance from the actual shore as to leave between its course and the shore an excess of unsurveyed land so great as clearly and palably to indicate fraud or mistake in the survey, then the court will, for equitable reasons, treat the meander line as a boundary, and if the discrepancy is so great as to show that a meander of the water line was not actually made, or if the meander line does not conform to, and approach, the true shoreline, the meander line will be taken as the boundary. Likewise, if there is no body of water corresponding to the meander line, to which the ownership of the holders of the adjoining subdivisions can extend or if such body of water is not reasonably near the meander line, the meander line will be taken as the boundary, as it will where an official survey meandered not a permanent body of water, but low marsh lands or similar lands adjacent to other lands being surveyed, and where the land between the meander line and the water is platted as a separate survey.

"Another limitation of the General rule is that, where the meander line is drawn on one side of one of the regular survey lines, either section line, one-fourth line, or one-sixteenth line, the boundaries cannot be extended across such line in order to reach the water front where such survey line appeared on the government plats as the boundary of another lot or subdivision conveyed to someone else. Such an intercepting governmental survey line is not, however, in and of itself a complete bar to further search for an actual water boundary, where a water boundary is represented in the original plat or survey, the primary consideration being to ascertain what was the intention or purpose in the original governmental survey platting of the property bordering on any particular body of water. Likewise, the limitation restricting the grantee to a regular survey line does not apply where the contour of the shore is very similar to that shown by the meander line, and where no other lands are conveyed or surveyed by the United States which, even by a projection of their lines to the shore, can interfere with the projection of the grantee's lines, or where the meander line frequently crosses the survey line, thus conclusively refuting the inference that the government intended that the lot line should be confined within the survey lines."

11 Corpus Juris Secundum, page 579

Par. 34—Shifting of Channel or Shore: "With qualifications to be stated, the general rule is that where, by a sudden or violent change, the channel or shore on which riparian or littoral lands are bounded is shifted, the boundaries of such lands are unaffected, and remain in their original position; but that where the change is gradual and imperceptible, whether caused by accretion, reliction, or avulsion, the boundaries shift with the shifting of the channel or shore. If the land of the riparian proprietor is increased, he is not accountable for the gain, and if it is diminished he has no recourse for the loss.

"The rule as above stated has been qualified by the phrase 'in the absence of definite intention to the contrary;" it is not applicable where the body of water or watercourse as such is not made the boundary, but instead the boundary is made a definite and fixed line as of the date of the conveyance by a survey with reference to the water, or by the highwater mark as it then existed, or by the bank of the water as it then existed."

Footnote 52. Rivers to which rule applies: "The doctrine that the owner takes the risk of the increase or diminution of his land by the action of the water applies as well to rivers that are strong and swift, to those that overflow their banks, and whether or not dykes and other defenses are necessary to keep the water within its proper limits."—Philadelphia Co. v. Stimson, D.C. 32 S.Ct. 340. 223 U.S. 605, 624, 56 L.Ed. 570.

11 Corpus Juris Secundum, Boundaries, page 557

Construction and Effect of Particular Calls: "The quantity of land intended to be included in a grant or conveyance will not, of itself, either enlarge or limit the boundaries or riparian lands, but in doubtful cases, where the boundaries are not definitely fixed, it may be considered in arriving at a true construction of the instrument. Thus, where a nonnavigable stream is the boundary, and the quantity of land called for would include the bed of the stream, and where such exclusion would also bring into operation the other calls in the conveyance, the bank and not the thread of the stream will be considered the boundary."

8 American Jurisprudence—Boundaries

Par. 2, Construction; Intent: "Of course, if there is no ambiguity in the descriptions used in the conveyance, they are to be taken as the conclusive evidence of the intention of the parties."

Vol. V, Words and Phrases, Permanent Edition

Between the Dwellings, Page 405: "Where a way extends across a piece of land, and between two dwellings, and in a grant of the way it is spoken of as 'between the dwellings,' and also in another portion of the grant as extending the entire length of the lot, the phrase 'between the dwellings' is to be construed not as limiting the extent of the way to that portion of it between the dwellings, but as a description of the thing granted." Dunn vs. English, 23 NJL (3 ZAB) 126, 129.

Exclusion of Place, Page 402: " 'Between' indicates an intermediate space, which excludes and cannot include that to which it refers; and that which lies between one given place and another is something distinct from the place given on 'either' side. Hence if land is granted between one town and another both are excluded from the grant, or if land is conveyed lying between lot No. 1 and lot No. 3 it cannot be pretended that either of these lots passed by the deed."

Vol. 5, Thompson on Real Property

Accretion: Page 296, Par. 2546: "Where a water-line is the boundary of a lot or tract of land, such line, no matter how it shifts, remains the boundary, and a deed describing the lot or tract by number or name conveys the land up to such shifting line exactly as it does up to a fixed side-line and conveys all the accretions thereto." (Oberly v. Carpenter, 67 N. Dak. 495, 274 N.W. 509.)

Formal Parts of Deeds: Page 670, Par. 3442: "Where the land is described as lying on a river named, the meander line of the river as surveyed does not constitute the boundary of the land, but the grantee is a riparian owner, and has title to the land lying between such meander line and the river, or to the thread of the river in case the boundary line is governed by the common-law rule.

Par. 3443: "Meandered lines as boundaries.—A 'meander line' is a line run by the government for the purpose of defining the sinuosities of the shore or bank of a body of water and as a means of ascertaining the quantity of land in adjoining fractional areas subject to sale by the government and, as a general rule, it is not necessarily such line but rather the water course itself, which constitutes the boundaries of land bordering thereon. It is recognized, however, that the intention of the parties governs. In cases of fraud or mistake in running the meander line it has been held that the meander line was a boundary line . . . ".

16 American Jurisprudence—Deeds

Par. 285, Generally: According to Intent: "If the language of the deed is not repugnant or ambiguous, but of plain and obvious import, there is no occasion to resort to extrinsic evidence."

" . . . the description in the deed is determinative, for it is well settled that nothing passes by a deed except what is described in it, whatever the intention of the parties may have been."

The court held in the case of "*Wisconsin Realty Company vs. Lull, et al.,*" *187 N.W. 978,* that where the meander lines of a river as shown on the Government plat do not correspond with the actual location and course of the river, grantee, to whom all the land in certain section north of the river was conveyed, did not take to the actual river, though beyond the meander line on the plat, but took merely to the section subdivision line.

The deed conveying " . . . lot one in section twenty-one being all the land in said section north of the Flambeau River and containing 65.48 acres more or less according to the United States Government survey," was held to convey merely the land platted as lot one containing substantially 65.49 acres, though actual

location of river extended far beyond the location as shown on the meander lines of the plat, so that in fact the land in the section north of the river contained 173 acres.

(b) "*Mecca Land and Exploration Company* vs. *Schlecht. et al.*, (U.S. District Court of Arizona, January 27, 1925), it was held that where at the time of the Government survey certain tracts of public land bordered on the Colorado River and were [defined] by a meander line, but before their entry by homesteaders the river had receded and a large tract of arable lands had been formed between it and the meander line, more than three time the size of the surveyed tracts, which land had never been officially surveyed which was not claimed by the entrymen, who received patents according to the survey and for the quantities shown thereby, the meander line constituted their boundaries, and a subsqeuent purchaser from them, after the new formed land had been taken possession of by the United States, protected by a levee, and included in an irrigation project, such purchaser was not entitled to claim such land as accretion to the surveyed tracts.

Perhaps the most valuable legal authority on this question is found in "*Madison* vs. *Basart*", 59, Decisions of the Department of the Interior, 415 at page 421:

"It is a general rule that a meander line is not aline of boundary but one designed to point out the sinuosity of the bank or shore and as a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the water line itself. But there are a number of exceptions to this general rule. . . . Another well established exception is that if, at the time a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will be construed to convey only the lands within that meander line. This latter exception, which clearly is applicable to the present case is the present rule of the Department."

CONCLUSIONS AND OPINION

Based upon the facts set out or referred to herein, and the law applicable to these facts, I have reached the following conclusions:

1. Inspector Sweet did not seek, nor did he intend to seek, for the use of the Cocopahs, any land west of Section thirty.

2. Inspector Sweet knew there was fast land in a different or new section west of thirty.

3. The General Land Office and the Bureau of Indian Affairs knew that there was fast land west of that shown in Section thirty by the official plat of township nine south, range twenty-four west, G. & S.R.M., Arizona, approved April 18, 1874. These offices or bureaus either knew or had information from which they could have learned that Section thirty was in esse as a whole section, and that to the west of said section and between it and the Colorado River there was a new fractional section.

4. That the Executive Order, as drawn, did not convey, nor did it intend to convey, anything west of Section thirty.

5. That had it been the intention of the draftsmen of the Order to do so, they could have used language which could not be subject to any other interpretation.

It is my opinion that the Cocopahs cannot legally claim land west of Section thirty by virtue of said Executive Order. It is even doubtful, in view of the wording of said Order and the knowledge that the draftsmen of said Order had as to the accreted land, that the Cocopahs can, if contested, successfully claim land west of Lots five and six as shown on the official plat of 1874, even though they limit their claim to within the boundaries of Section thirty. The Executive Order states:

". . . Lots two, four, five and six, together with such vacant, unsurveyed and unappropriated lands adjacent to the foregoing described subdivisions and between the same and the waters of the Colorado River as would, upon an extension of the lines of existing surveys, constitute fractional portions of the north-east quarter and the north-west quarter of Section thirty. . . .".

An extension of the lines of existing surveys would not make lands west of Lots five and six portions of the north-east quarter and the north-west quarter of Section thirty.

SUGGESTIONS

Since this is a matter of great importance generally, and to the Cocopahs particularly, and a matter concerning which there may be an honest difference of opinion, I offer the following suggestions:

1. Submit this memorandum to the Central Office for review, both by the Office of the Chief Counsel and that of the Solicitor.

2. If it is determined by the Solicitor that the Cocopahs take to the Colorado River by virtue of said Executive Order, then the Secretary should make that fact known to all Bureaus concerned.

3. If said Executive Order does not take the Cocopahs to the Colorado River, then it will have to be determined whether the Cocopahs need additional land, and if so, where and how much land should be obtained or set aside for them.

EXHIBIT C

EXHIBIT D

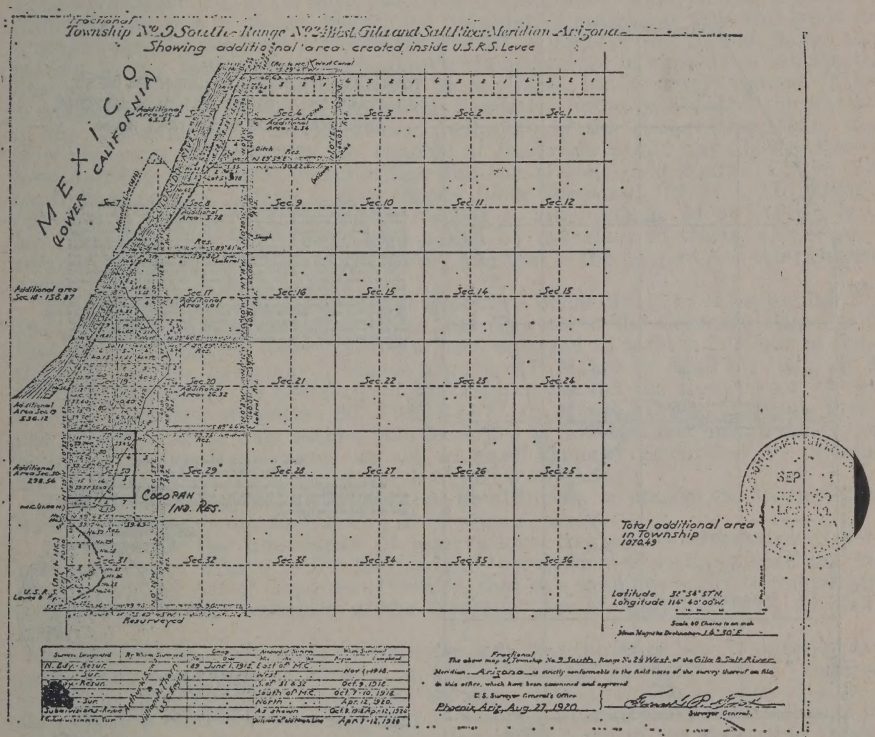
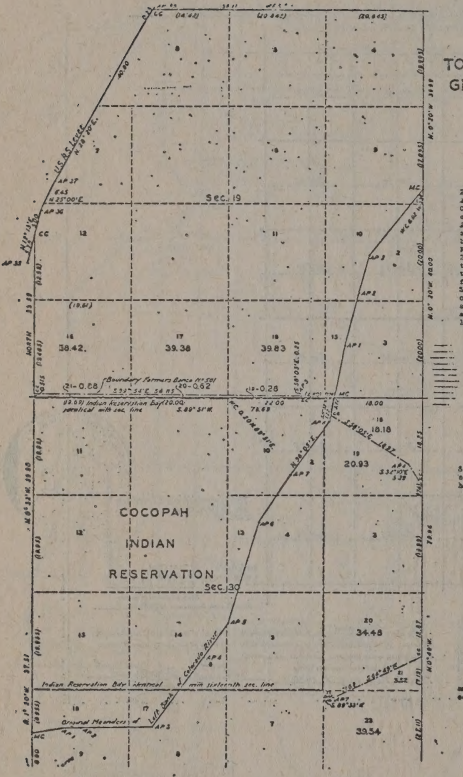

Fractional
Township No. 9 South Range No. 24 West Gila and Salt River Meridian Arizona
Showing additional area created inside U.S.R.S. Levee
MEXICO
CALIFORNIA
ROWER
Sec. 1
Sec. 2
Sec. 3
Sec. 4
Sec. 5
Sec. 6
Sec. 7
Sec. 8
Sec. 9
Sec. 10
Sec. 11
Sec. 12
Sec. 13
Sec. 14
Sec. 15
Sec. 16
Sec. 17
Sec. 18
Sec. 19
Sec. 20
Sec. 21
Sec. 22
Sec. 23
Sec. 24
Sec. 25
Sec. 26
Sec. 27
Sec. 28
Sec. 29
Sec. 30
Sec. 31
Sec. 32
Sec. 33
Sec. 34
Sec. 35
Sec. 36
Additional area Sec. 18 - 136.87
COCOPAH IND. RES.
Total additional area in Township 1012.43
Latitude 32° 54' 57" N.
Longitude 114° 43' 00" W.
Scale 80 Chains to an inch
Fractional
Phoenix, Ariz. Aug. 27, 1920
Surveyor General.

EXHIBIT D



FRACTIONAL

TOWNSHIP Nº 9 SOUTH, RANGE Nº 24 WEST,

GILA AND SALT RIVER MERIDIAN, ARIZONA,

SUPPLEMENTAL PLAT OF SECTIONS 19 & 30.

SCALE - 10 CHAINS TO AN INCH

This supplemental plat of Sections 19 and 30, Fractional Township No. 9 South, Range No. 24 West, of the Gila and Salt River Base and Meridian, in the State of Arizona, presents the retracement of the original meanders of the left bank of the Colorado River in Section 30, from Angle Point No. 8 thereof to the easterly corner of sections 19 and 30, and of the U. S. M. Lower from Angle Point No.30 to Angle Point No. 34 thereof; the resurvey of the west boundary of said township west of said sections 19 and 30, and the subdivisional lines between sections 19 and 30, and between sections 29 and 30;and the survey of part of the boundary of Farmer's Ranch No.501 in said section 19 and 30, all as executed by Francis E. Joy, U.S.Cadastral Engineer, February 21 to 23, 1930,under supplemental special instructions issued by the Chief Cadastral Engineer for Group 134, Arizona, dated October 12, 1929, authorized by the Commissioner's letter "C" dated September 9, 1927, and is prepared for the purpose of segregating said Farmer's Ranch No. 501 from Lots 13 and 14 and SE¼ SW¼ of Section 19, and from Lot 1 and N½ NE¼ of section 30, as shown on plat of said township approved August 27, 1910, creating thereby Lots 15, 17, 18, 19, 20 and 21 of section 19, and Lots 18, 19, 20 and 21 of section 30, which supersede the aforesaid designations of such tracts, and hereafter apply to the disposal of the land.

Office of the U. S. Supervisor of Surveys,
Denver, Colorado, March 7, 1931.

This supplemental plat of sections 19 and 30, of Fractional Township No. 9 South, Range No. 24 West, of the Gila and Salt River Base and Meridian,in the State of Arizona, is strictly conformable to the field notes of the survey thereof, which have been examined and approved.

U. S. Supervisor of Surveys.

Department of the Interior,
General Land Office,
Washington, D. C., March 20, 1931.

The survey represented by this plat having been correctly executed in accordance with the requirements of law and the regulations of this office, is hereby accepted.

Assistant Commissioner.

6. *COCOPAH TRIBE v. HICKEL*, PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, MARCH 15, 1971 (EXCERPTS)

1. The Secretary of the Interior has acted in excess of his authority by changing the boundary of the Cocopah Reservation contrary to express statutory prohibition. The Cocopah Tribe has always considered the lands of the Reservation to have extended to the waters of the Colorado River, by the plain meaning of Executive Order No. 2711; until 1955, the United States concurred in this interpretation. As will be shown below, the defendant's statement that the lands in question herein have been consistently treated as lands of the United States not subject to any Indian claim (defendant's memorandum in support of motion to dismiss, p. 2) is not only unsupported by any facts, but is simply untrue. If, as is contended by the Cocopah Tribe, the Executive Order established the waters of the Colorado River as the western boundary of the Reservation, then, the slow westward movement of the channel of that river would have left accreted land between the former meander line and the present river course. Under the controlling case of *Jeffries v. East Omaha Land Company*, 134 U.S. 178 (1890), followed in *Choctaw and Chickasaw Nations v. Seay*, 235 F. 2d 30 (10th Cir.), *cert. den.* 352 U.S. 917 (1956), land added by accretion to tracts which were riparian at the time of the official survey and plat is the property of the riparian owner.

The Cocopah Tribe has alleged that Executive Order No. 2711 of September 27, 1917, established a Reservation which was riparian to the Colorado River, and that by accretion, the Reservation has been enlarged to include portions of Sections 25 and 26, Township 9, Range 25 G. & S.R.M. yet on April 15, 1955, by a Solicitor's Opinion, the Secretary of the Interior limited the Reservation to the western boundary of Section 30, T9S, R24W, G. & S.R.M. The Cocopah Tribe has alleged that by this action, the Secretary of the Interior has changed the boundary of the Reservation, an act which is explicity prohibited by statute, and is thus beyond the scope of the Secretary's authority.

That the Secretary of the Interior has no authority to change the Reservation boundary is clear from 25 U.S.C. § 398d, which states:

"Changes in the boundaries of reservations created by Executive Order, proclamation or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, that this shall not apply to temporary withdrawals by the Secretary of the Interior. (Act of March 3, 1927, 44 Stat. 1347.)"

No showing has been made by the defendant that the lands here in question are part of any temporary withdrawal, not that there has been any Act of Congress excluding these accretion lands from the Reservation. In the absence of such a showing it is clear that the Secretary is without authority to effect a change in the boundaries of the Cocopah Reservation as set forth in the Executive Order. The Secretary having acted beyond his authority, specific injunctive relief is appropriate to compel the Secretary to confirm his actions to the law in order to alleviate the injury inflicted by his unlawful actions, so long as no intolerable burden is placed upon a proper governmental function. Cf. *Washington v. Udall, supra.*

As the Supreme Court stated in *Ickes v. Fox*, 300 U.S. 82 at 98 (1937):

"If the conduct of the defendant (Secretary of the Interior) constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process . . ..

The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

It is instructive to note that the principle in *Ickes* was reaffirmed in *Arizona v. California*, 373 U.S. 546 (1963) at 584–585.

In the case at bar, there is no conceivable way in which the granting of relief to the impoverished Cocopah Tribe could impose an intolerable burden upon any governmental function or thwart any purpose of the United States. Title to the

property would not be affected since the land is already held by the United States. No burden would be imposed upon the public treasury by reason of an injunction preventing the Secretary from excluding the Cocopah Tribe from exercising its right to these lands, since no expenditure need be made simply to effectuate Cocopah occupancy.

In fact, the purposes and interests of the United States would be advanced by the prevention of this wrongful exclusion because the United States is the trustee for the Cocopah Tribe (cf. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919)) and is affirmatively charged with the fiduciary duty of promoting the interests and well being of its Indian beneficiaries. The promotion of a better life for the Tribe would serve federal interests. Thus, under *Washington v. Udall, supra*, no reason exists for the doctrine of sovereign immunity to be applied in this case.

2. The Secretary of the Interior, by interpreting the plain language of the Executive Order of September 27, 1917 so as to exclude from the Reservation subsequently accreted lands, has breached his fiduciary duty to the Cocopah Tribe, and has thereby acted beyond his statutory authority.

The obligation of the United States, and, under 25 U.S.C. § 2, the Secretary of the Interior, to protect and advance the interests of Indian tribes for which lands are held in trust is one which has been judicially recognized since the early days of the Republic. An unbroken succession of Supreme Court opinions has affirmed the principle that the United States, as trustee for its Indian beneficiaries, is bound to resolve any ambiguities in statutes, treaties or agreements concerning the status of Indians or Indian trust property in favor of the Indians. *E.g.*, *Worcester v. Georgia*, 6 Pet. 515 (1832); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Kagama v. United States*, 118 U.S. 228 (1886); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Squire v. Capoeman*, 351 U.S. 2 (1955).

Because of the fiduciary relationship between the United States and dependent Indian tribes, the courts of the United States have given the most expansive construction possible to documents establishing Indian reservations. *Winters v. United States*, 207 U.S. 564 (1907); *United States v. Winans*, 198 U.S. 371 (1905); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *United States v. Ahtanum Irrigation District*, 236 F. 2d 321 (9th Cir. 1956), *cert. denied* 381 U.S. 924. These cases establish that the generous construction of documents establishing Indian reservations is part of the trust obligation owed by the Secretary of the Interior to the Indian Tribes.

Lamentably, this obligation has often been subordinated to the interests of other agencies of the United States when various agencies under the Secretary of the Interior have infringed upon Indian rights. However, the President of the United States, in his Message on Indian Affairs of July 8, 1970, reaffirmed the commitment of the United States to its trust responsibility:

The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the private interests of Indians in land which the government holds as trustee.

Every trustee hs a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists. (U.S. Code Cong. and Admin. News, No. 8, pp. 2965–2974) (Emphasis in original).

The Solicitor's Opinion of April 15, 1955, which recognizes possible ambiguities in the Executive Order of September 27, 1917 (and which in fact implies ambiguities extrinsic to the language of the order) could in no way be characterized as an action taken with the highest degree of diligence and skill to advance the interests of the Cocopah Tribe. What this opinion, and subsequent actions in reliance upon it, accomplish is the divestment of rights of the beneficiary to the benefit of the trustee; this is self-dealing of the most blatant type, and the very sort of situation condemned by the President in his Message, *supra*. That this action was initiated within the Department of Interior merely compounds the unconscionable nature of the action.

The Supreme Court explicitly held in *Lane v. Pueblo of Santa Rosa, supra,* that an Indian tribe may sue to enjoin the Secretary of Interior from violating his fiduciary duty by listing or disposing as lands of the United States lands to which the Indians claim rights. In *Lane,* the Supreme Court rejected the contention of the United States that the Secretary of the Interior was empowered to treat Indian trust lands as public lands of the United States:

"Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States, and disposing of the same under the Public Land Laws. That would not be an exercise of guardianship, but an act of confiscation. (249 U.S. at 113)"

The United States, as trustee for the Cocopahs, is subject to the same standards in administering Indian trust property, "as would be applied to an ordinary fiduciary." *Menominee Tribe v. United States,* 101 Ct. Cls. 10 (1944), and the Secretary of the Interior is "bound by every moral and equitable consideration to discharge its trust with good faith and fairness." *United States v. Payne,* 264 U.S. 446 (1924). "The most exacting fiduciary standards" should be applied in scrutinizing the government's dealings with Indians, particularly when, as in the case at bar, another Bureau of the Department of the Interior might have an interest adverse to the Indian Tribe involved. *Navajo Tribe v. United States,* 364 F. 2d 320 (Ct.Cls. 1966).

Further, this trust obligation has attained constitutional status, since it has been held to be an implicit part of Article I, Section 8, Clause 3 of the United States Constitution, which grants to Congress the power to regulate commerce with the Indian Tribes. *Williams v. Lee,* 358 U.S. 217, at 219, n. 4 (1958); *Maryland Gas Co. v. Citizens National Bank of West Hollywood,* 361 F. 2d 517 (5th Cir. 1966). Insofar as the Secretary of the Interior has breached his trust obligation to the Cocopah Tribe, he has breached his constitutional responsibilities as well.

3. The Secretary of the Interior acted in violation of the Fifth Amendment to the Constitution of the United States when his Solicitor issued an opinion depriving the Cocopah Tribe of its property without notice or opportunity to be heard.

Procedural due process requires that persons suffering the termination of a Federal right be afforded notice and an opportunity to be heard. *Goldberg v. Kelly,* 397 U.S. 254 (1970). If, as in *Goldberg,* welfare recipients must be afforded notice and an opportunity to be heard before welfare benefits can be terminated, certainly the Cocopah Tribe had the right to notice and a hearing on the question of whether their Reservation would be significantly diminished in size. Yet, not only was no notice afforded to the Cocopahs, but the fact that the question was being considered was actively concealed from the Tribe.

The most elemental requisites have been denied to the Cocopahs throughout the entire history of the dispute as to the actual boundaries of the Reservation, in plain contravention of due process of law.

It is thus clear that this case involves substantial allegations by the Cocopah Tribe that the Secretary of the Interior has acted in violation of the Constitution of the United States.

* * * * * * *

THE ALLEGATIONS OF THE COMPLAINT ARE SUBSTANTIAL

The Cocopah Tribe contends that the intent and plain meaning of the Executive Order of September 27, 1917, No. 2711, was to create for the Cocopah Tribe a reservation, the western boundary of which was the waters of the Colorado River. This interpretation of the Executive Order was accepted by the United States and the Cocopah Tribe until April 15, 1955, at which time the Solicitor of the Department of the Interior, acting on behalf of the Secretary of the Interior, ruled that the western boundary of the Reservation was the western boundary of Section 30, T.9S., Range 24W., G. & S.R.M. (See affidavit of George Forman, attached hereto and by reference incorporated herein; Exhibits 1 and 2).

The unambigious language of the Executive Order, when considered together with documents attesting to thirty years of recognition of the Cocopah Tribe claim to the lands which have accreted to the lots explicitly granted in the Executive Order, provide substantial and compelling evidence that the Solicitor's determination was erroneous and without basis in fact or law.

Contemporaneous documents demonstrate that the intent of the Executive Order was to include within the Reservation lands riparian to the Colorado River. An early draft of the Executive Order would have limited the grant to "N.W./4 and lots 2, 4, 5 and 6, all in Section 30, Township 9S Range 24W, G. and S.R.M.,

containing 242.58 acres." (Forman affidavit, Exhibit 3) (The lands comprising the Reservation were originally part of Reclamation withdrawals made by the Secretary of the Interior in 1902, for the Colorado Project, and in 1905, for the Yuma Project. Forman affidavit, Exhibit 4).

However it was soon regognized that according to the official survey then in use (Forman affidavit, Exhibit 5) the Northwest quarter of Section 30 did not exist as American territory. The wording of the proposed Executive Order was therefore amended so as to include such lands as had accreted to lots 2, 4, 5 and 6 between the 1874 meander line and the course of the Colorado River. (Forman affidavit, Exhibit 6).

Since there was no official survey from which the acreage lying between lots 2, 4, 5 and 6 could be determined, no acreage could be specified. That the 1874 survey plant was used in determining the lands to be granted is evident from the reference in 1918 to the small acreage contained in lot 6. (Forman affidavit, Exhibit 7)

In 1919, the Director of the United States Reclamation Service acknowledged that the Cocopah Reservation consisted primarily of unsurveyed accretion lands (Forman affidavit, Exhibit 8); the only ambiguity apparent to that Service was in relation to a township number. (Forman affidavit, Exhibit 9)

The Reservation land west of that fractional part of Section 30 which did exist on the 1874 survey was part of the "Farmer's Banco," which had been formed by, an avulsive change in the course of the Colorado River in 1905. (Forman affidavit Exhibit 10.) The Banco lands could not be officially surveyed or otherwise explicitly treated as lands of the United States until the International Boundary Commission had ruled on whether title lay in the United States or Mexico. Title did not officially pass until October 25, 1927, and thus, any attempt by the United States to claim lands west of the course of the River as it was prior to the 1905 change would have violated the treaty on boundaries entered into by the United States and Mexico on November 12, 1884 (24 Stat. 1012), for the land "had the legal status of Mexican territory until transferred to the United States by the action of the Commissioner under treaty provisions." (Forman affidavit, Exhibit 11).

According to the 1874 official survey used in formulating the Executive Order, lots 2, 4, 5 and 6 of what was then Section 30 were riparian to the Colorado River. Being unable to officially ascertain the amount of land then between those lots and the Colorado River, the President so phrased his Executive Order to ensure that, upon the surveying and platting of lands added to the United States by the Boundary Commission, the Reservation would be as riparian to the Colorado River as it would have been in 1874.

The record is clear that between the date of the Executive Order and the adoption of the Solicitor's Opinion, the Cocopah Tribe made continual use of the accreted lands.

Repeated requests were made by Bureau of Indian Affairs personnel on behalf of the Cocopahs for permission to farm the Reservation lands despite the claim filed for the Banco lands by a Mexican national. These requests were always granted. (Forman affidavit, Exhibits 12, 13, 14, 15 and 16).

In 1948 the Bureau of Indian Affairs affirmed that under the Executive Order of September 27, 1917, the Cocopah Reservation extended to the Colorado River and would thus include subsequently accreted lands under the principle of *Jeffries v. East Omaha Land Co., supra.* (Forman affidavit, Exhibits 17 and 18) In 1950, the Bureau of Reclamation also acknowledged that the Cocopah Reservation extended to the Colorado River. (Forman affidavit, Exhibit 19)

The context within which the Solicitor's Opinion of April 15, 1955 was issued is instructive as to the manner in which the Secretary of the Interior went about fulfilling his trust responsibilities to the Cocopah Tribe. Very early in the history of the Cocopah Reservation efforts were made by hostile White people to identify the Cocopahs as Mexicans rather than as American Indians and thus render them ineligible for Federal assistance. (Forman affidavit, Exhibit 20) The Indian office personnel working with the Cocopahs at that time recognized the error of this claim, and the Cocopah Tribe protested against the injustice of the deprivation which resulted. (Forman affidavit, Exhibits 21, 22, 23 and 24)

Nonetheless, in 1957, the Phoenix Area Director for the Bureau of Indian Affairs, F. M. Haverland, undertook to prepare a new Tribal roll which would have precluded from enrollment a considerable group of American Cocopahs. (Forman affidavit, Exhibits 25 and 26)

Harverland then used the diminished Tribal roll as a justification for cancelling an agreement with the Bureau of Reclamation under which the Cocopah Tribe

was entitled to utilize certain otherwise unused lands. Suddenly, the Cocopahs on these lands became non-Indians for whom the United States had no responsibility. (Forman affidavit, Exhibits 27, 28 and 29)

That these events should have occurred in the sequence they did is suggestive of more than mere coincidence. What in fact occurred was a systematic effort to reduce or eliminate Federal trust responsibility for a recognized Indian Tribe, in derogation of Tribal interests, and for the benefit of the United States. It is clear from the attitude taken by the Secretary of the Interior and his agents, that the fulfillment of Federal trust responsibilities to the Cocopah Tribe was not of paramount concern. There appears to have existed an attitude of vindictive arbitrariness in the derogation of Cocopah lands, membership, and economic development. It is time that the suffering of the Cocopah Tribe be ended, and the Secretary of the Interior be made accountable for the abuses of discretion, the excesses of authority and the denial of constitutional rights which he and his agents have perpetrated as trustees for this dependent people.

7. CORRESPONDENCE RELATING TO HAVASUPAI DISPUTE WITH FOREST SERVICE

HAVASUPAI TRIBAL COUNCIL,
HAVASUPAI RESERVATION,
Supai, Ariz., May 31, 1971.

The Hon. EDWARD KENNEDY,
U.S. Senate Office Building,
Washington, D.C.

DEAR SENATOR KENNEDY: Our people are in trouble. We appeal to you for help. Our difficulty is not new, but it has become critical.

Tourist brochures enthusiastically describe our 518-acre reservation as America's tiniest (Americans love superlatives); for 90 years we have been faced with trying to eke a living for 200 people from these 518 acres. We have never been able to, nor can we now. Moreover, our village is set astride the only trail to a National Park Service campground, itself located on our former lands. This subjects us to a flow of over 10,000 tourists a year streaming through our lands, whether we like it or not.

Our people traditionally lived on the Coconino (named, in fact, from the Hopi name for our people) Plateau and farmed elsewhere in the Grand Canyon besides our present tiny reservation. With the coming of Grand Canyon National Park in 1919 we were driven back to this canyon. For some years we have had use rights to plateau land from both the Forest Service an the Park Service; however, Park permit land may not be improved or developed. This makes it useless for grazing when there is no water.

Now the Park Service proposes to take over our only outpost on the canyon rim (presently in Kaibab National Forest) as well as other nearby Forest lands. We would be surrounded, subject to the whims of the Park Service, with whom we have achieved only an uneasy co-existence at best. After 90 years of struggle our people would be doomed to serve as National Park attractions, like the bears in Yellowstone.

Some of our lands, like Indian Gardens, are gone forever; we recognize that bitterly but realistically. We cannot ask for all our former area, but we desperately need plateau land to restore some measure of our former lives, to hunt, and to start a modest cattle business. We must break out of our confinement to life in this tiny canyon dependent on tourist and government hand-outs.

We turn to you because of your active interest in Indian problems, in keeping with your late brother Robert's compassionate concern for our broken lives. You and your family have become a symbol of hope to our people.

We ask you to do this:

(1) Read the materials we have enclosed concerning the Park Service plan and Indian reaction to it.

(2) If you find them persuasive, oppose the Park Service's attempt to expand into Indian-use areas.

(3) Help our people add vitally-needed plateau land to our reservation—specifically Hualapai Hilltop, Long Mesa, upper Havasu Canyon, our grazing permit lands and the Park Service's Havasu Campground (We must not be subject to the demands of the Park any longer.).

We are hoping you will see the justice of our demands.

We have also contacted Senators Robert Griffin, Fred Harris and Clifford Case.

Respectfully,

LEE MARSHALL,
Chairman, Havasupai Tribal Council.

SUPAI, ARIZ.

Completely surrounded by a national park, Arizona's tiny Havasupai Indian tribe has struggled for 90 years to expand its shrunken, 518-acre reservation. Havasupai tribal chairman Lee Marshall has said, "Land is the only thing the tribe needs to survive in this world. That's the only thing we have to live for—land."

Now the proud inhabitants of the Grand Canyon face a life dependent on the National Park Service with perhaps their last chance for expansion cut off.

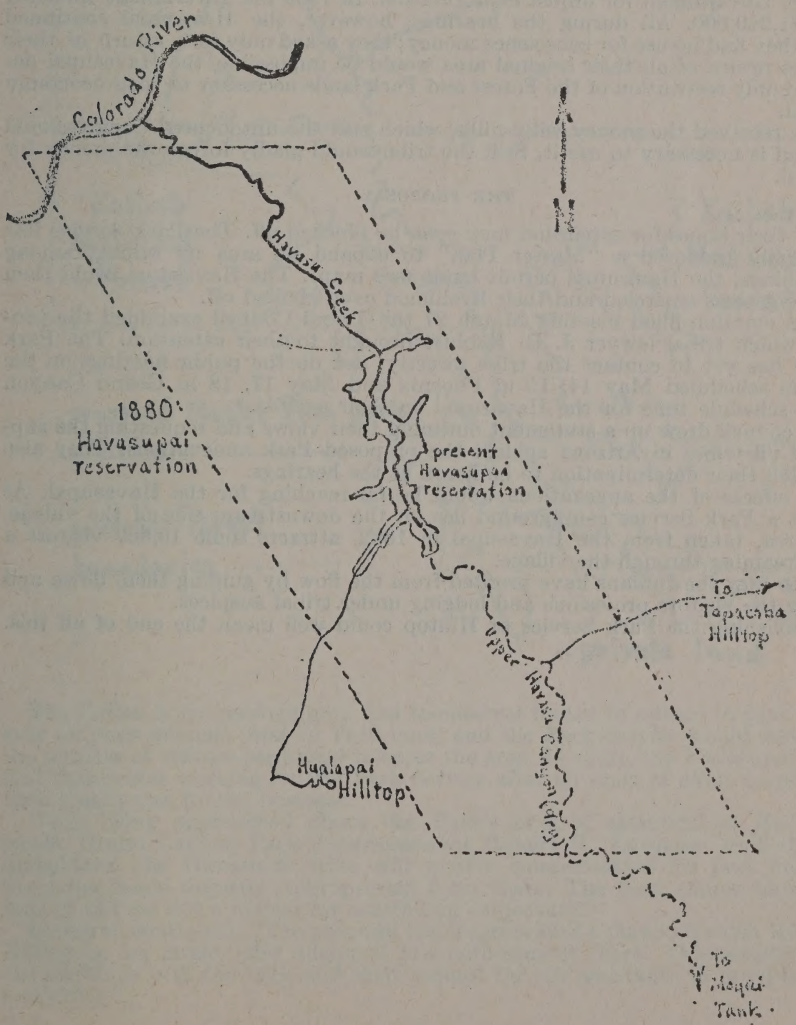
A new "Master Plan for Grand Canyon National Park" asks Congressional approval for the Park Service to annex Kaibab National Forest land near the Havasupai reservation. The land proposed for annexation includes the Indians' one outpost on the canyon rim as well as the site of their nearly-completed village generator.

BACKGROUND

The Havasupai people inhabited much of the Grand Canyon area before the coming of the white man. For centuries they have ranged over its plateaux, gathered at its springs and tilled its watered areas. The first European to record his contact with them, the franciscan father Garces, visited their lands in 1776.

By 1880 the U.S. Army had subjugated most of the peoples of Arizona's northern plateau and confined them to reserves of one sort or another. That year Rutherford B. Hayes established a reservation for the Havasupai, who were continuing to live relatively untouched in their remote canyon fastnesses. This 1880 reservation was simply a 48-sq. mi. parallelogram enclosing their summer farms at the bottom of Havasu Canyon (see map).

Within two years the demands of eager prospectors pushed the Army Corps of Engineers into resurveying the Havasupai reservation, and in 1882 Chester A. Arthur reduced the area to 518 acres on the canyon floor, including only the barren talus slopes in addition to the canyon floor.



With the formation of the Grand Canyon National Park in 1919 the Havasupai were driven from their farms at Indian Gardens. Havasupai who still remain in the area depend on the Grand Canyon concessionnaire, Ferd Harvey Enterprises for menial wage labor. With the coming of the park and ranchers elsewhere the traditional life on top was gone.

At present the Havasupai have turned their spectacular home to the only advantage possible—tourism. They meet visitors at Hualapai Hilltop on the rim of their canyon and for a set fee guide them down the eight miles of trail to their homeland.

The Hilltop station is located in Kaibab National Forest, with whom the tribe has reached an accommodation. The tribe's use permits from the Forest Service allow them to manage Hualapa Hilltop as well as using lands on top for cattle grazing. They have used the possiblilty of improving Forest Service land to put in earth catchment tanks and had begun a plan to pipe water from the village's spring-fed creek to the arid lands above.

Their biggest hopes stem from the efforts of Rep. Sam Steiger (R.–Ariz) to initiate Congressional action to return some of these important lands to the Havasupai reservation. The Steiger bill would return Hilltop, grazing land on both sides of Havasu Canyon and a Park Service campground on former Havasupai land below the village.

These lands and others were recently the subject of a federal land claim against the U.S. Government for unjust expropriation. In 1969 the government awarded them $1,240,000. All during the hearings, however, the Havasupai continued to say they had no use for conscience money; they asked only for a return of their land. As return of all their original area would be impossible the Havasupai demanded only restitution of the Forest and Park lands necessary to their economic survival.

They received the money willy-nilly, which still sits untouched; Congressional go-ahead is necessary to use it. Still the tribe would gladly forego the money for the land.

THE PROPOSAL

Now their hopes for expansion may soon be blocked off. The Park Service has unilaterally proposed a "Master Plan" to expand its area by taking, among other things, the Havasupai permit lands (see map). The Havasupai could then find themselves encircled and their livelihood even choked off.

In an emotion-filled meeting March 27 the Tribal Council examined the proposal, which tribal lawyer J. R. Babbitt brought to their attention. The Park Service has yet to contact the tribe directly; nor do the public hearings on the proposal scheduled May 14, 15 in Phoenix and May 17, 18 in Grand Canyon Village schedule time for the Havasupai on their agenda.

The council drew up a statement outlining their views and requesting the support of all tribes in Arizona against the proposed Park annexations. They also expressed their determination to be heard at the hearings.

The effects of the annexations would be far-reaching for the Havasupai. At present a Park Service campground lies on the downstream side of the village. This area, taken from the Havasupai in 1882, attracts some 10,000 visitors a year streaming through the village.

Up to now the Indians have profited from the flow by guiding them down and offering the visitors provisions and lodging under tribal auspices.

Establishing the Park Service at Hilltop could well mean the end of all this.

The Indian horse packers may find themselves forced to adhere to park standards on pack animals used on Park land, and the Park Service would determine the number of visitors permitted to enter the area. In short, the Havasupai would find themselves working for the Park Service after 90 years of effort to establish their locally-run tourist business.

Upon being approached about the Park's lack of attention to Havasupai needs, Grand Canyon Park Superintendent Robert R. Lovegren replied, "We understand the Havasupai tribe will receive compensation for past iniquities involving lands unjustly appropriated from them. The land claims have been settled and are not a matter for continuing conjecture."

Lovegren continued, "The proposal has incorporated a plan to include Hualapai Hilltop so we might offer adequate law enforcement there. This resulted from our meetings with the tribe and their request for our assistance in providing law and order."

A Bureau of Indian Affairs representative points out this is twisting the Havasupais' long-expressed wish to provide law enforcement at Hilltop—themselves.

The map which shows the proposed area changes in the Park's draft Master Plan shows the nearby Hualapai reservation but interestingly enough neglects to indicate even the existence of the Havasupai reservation close by the annexations. This is a damaging oversight or worse.

Council chairman Marshall complains bitterly of past disregard by the Park. "The Park Service and Fred Harvey are making thousands of dollars using lands that belong to the Havasupai tribe. What does the tribe get? Nothing. The Park Service is charging fees from every visitor to these lands. What does the tribe get? Nothing."

In effect, the Master Plan proposal is directed at preserving the Grand Canyon as a sort of vast outdoor museum, keeping it in as nearly a natural state as possible. This is commendable except where it impinges on the Havasupais' efforts to build a better and freer life for their children

For example, the Master Plan draft states: "The charm and beauty of Havasu Canyon is attracting more and more people, who threaten the area with results of their heavy impact on a limited, rather fragile environment. With extensive development on the reservation, the Havasupai may lose the charm and beauty of their environment and ultimately the qualities that attract the visitor."

The people of the tribe are not interested in serving as museum pieces.

Presently Supai's unemployment is high, its farming diminishes and its young people drop out of school and return to place further burdens on the tiny reservation. But the ancient dream of returning to the plateau will be hurt badly.

Chairman Marshall says, "We have been trying real hard to get land for our people down here. Now it seems lke we are being defeated. The Park Service is very big and very powerful, and I dont know how we can lick this problem."

Many Havasupai feel, with justice, that this is the last chance for their people and their way of life, that they must win this batte.

Marshall continues, "All the tribes are fighting, getting hurt, getting beat up by policemen, and they're doing all they can to get their land back. It seems to me we are getting a little bit of this problem on our reservation."

JULY 20, 1971.

Mr. GEORGE B. HARTZOG, Jr.,
Director, National Park Service,
Department of the Interior,
Washington, D.C.

DEAR MR. HARTZOG: I was concerned to hear that the Park Service plans to expand its jurisdiction and operations into an area presently under use-permit to the Havasupai Reservation in Arizona. It is my understanding, from the enclosed letter from the Tribal Chairman, that this would result in the Reservation being completely surrounded. Since the economic base of the Havasupai is already quite tenuous, further diminution of their permit lands would seem unconscionable. Can you explain?

Sincerely,

EDWARD M. KENNEDY.

Enclosure.

U.S. DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE,
Washington, D.C., August 4, 1971.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: Thank you for your recent letter regarding the Havasupai Indian lands near Grand Canyon National Park. We believe that the apprehensions expressed in the Tribal Chairman's letter to you are without real foundation.

The proposed master plan for Grand Canyon does not affect the boundaries of the Havasupai Indian Reservation. Other lands which may be included are currently used by the Havasupai Indians primarily for grazing. We assure you that we will continue to honor existing permits or rights they possess in relation to

these lands. Additionally, the master plan proposes a cooperative program including resource management, visitor use, grazing, and similar planning assistance to be extended to the Havasupai Tribal Council to help it establish a sound economic base.

Thank you for your continuing interest in programs of the National Park Service.

Sincerely yours,

THOMAS F. FLYNN, Jr.
Deputy Director.

8. MEMORANDUM IN SUPPORT OF PETITION OF BIA AND MOHAVE TRIBE TO INTERVENE IN CALIFORNIA SWAMPLAND CASE

U.S. Department of the Interior,
Bureau of Indian Affairs,
Washington, D.C., August 9, 1967.

U.S. Department of the Interior, Bureau of Land Management, Office of Appeals and Hearings

IN THE MATTER OF LAND CLASSIFICATION: STATE OF CALIFORNIA, APPLICANT

(Los Angeles 0164001—Swampland Selection)

Memorandum of points and authorities in support of petition of the Bureau of Indian Affairs to intervene in the above entitled proceeding and in reply to California's opposition to that intervention.

Title to the lands here involved resided in the Mohave Tribe of Indians " * * on the critical date of September 28, 1850 * * *":* [1]

(*a*) *Status of proceedings.*—Quite by accident and wholly fortuitously the above entitled proceeding and the decision of March 15, 1967, referred to above were brought to the attention of the Bureau of Indian Affairs during the last days of June 1967. By the decision of March 15, 1967, if it is allowed to stand, California would be awarded a substantial portion of the lands comprising the Fort Mohave Indian Reservation. From that decision the Bureau of Land Management has filed a timely appeal with authorities in support, to which California has responded. That appeal is *not* on behalf of the Indians.

On July 11, 1967, Commissioner Bennett of this Bureau filed with the Bureau of Land Management, Chief, Office of Appeals and Hearings, a memorandum asserting on behalf of this Bureau and the Mohave Tribe of Indians, Fort Mohave Indian Reservation, title to the lands involved in this proceeding, and petitioning to intervene in it. Service of a copy of that memorandum was made upon all parties listed in the decision of March 15, 1967, and they submitted returns on that service. By notice dated July 18, 1967, from Chief, Branch of Land Appeals, office of Appeals and Hearings, those parties were given thirty days to respond by motion or opposition to this Bureau's petition to intervene.

By a letter dated July 19, 1967, to the Director of the Bureau of Land Management from Paul M. Joseph, Deputy Attorney General, State of California, California interposed oppostion to this Bureau's motion to intervene. To that oppostion this memorandum of points and authorities is directed.

On August 7, 1967, having had no previous notice of the pendency of this proceeding or the decision of March 15, 1967, which would deprive them of invaluable property, the Fort Mohave Tribal Council of the Fort Mohave Reservation adopted a resolution directing Raymond C. Simpson, the Tribe's Attorney, to, among other things, join the Bureau of Indian Affairs in its petition to intervene. With his letter dated August 9, 1967, to the Director of the Bureau of Land Management, Mr. Simpson submitted a copy of the last mentioned Tribal Resolution and submitted the Tribe's petition to intervene in this proceeding.

A memorandum dated August 16, 1967, directed to the Commissioner, Bureau of Indian Affairs, submitted a memorandum dated July 31, 1967, from the Regional Solicitor, Los Angeles Region, to State Director, Bureau of Land Management, Sacramento, California. Likewise submitted was a copy of an opinion dated February 10, 1967, from the Associate Solicitor, Indian Affairs, in response to this Bureau's memorandum of December 7, 1964. The Regional Solicitor by reason of the February 10, 1967, memorandum states, "* * * there is no need to file any motion or objection to the request for intervention." In the memorandum dated August 16, 1967, this Bureau was directed to submit a reply to California's letter dated July 19, 1967, "as soon as possible."

[1] See Decision March 15, 1967, In the Matter of Land Classification, State of California, Applicant Los Angeles 0164001 Swampland Selection, Finding 1, page 11.

On August 21, 1967, there was received by certified mail a copy of a letter dated August 16, 1967, from Paul M. Joseph, Deputy Attorney General, State of California, interposing objection to the petition of the Tribe to intervene in this proceeding.

(*b*) *Prime issue presented.*—There is challenged by this intervention the Finding 1 of the decision of March 15, 1967. That finding—which is clearly erroneous—is as follows:

> That on the critical date of September 28, 1850, the land encompassed in the State's application was public land of the United States of America within the State of California.

Crux of California's opposition to this intervention: "When the right of the state to the land under the Arkansas Act [Swamp and Overflow Act] is perfected, its title relates back to the date of the enactment of the statute, September 28, 1850." As title to the lands in question resided in the Mohave Tribe of Indians on the date last mentioned, California's claim lacks validity and must fail. Prior to a full review of the title of the Indians reference will be made to California's contention, which lacks merit, respecting the timeliness of this intervention.

Failure to notify Fort Mojave Tribe of Indians or the Bureau of Indian Affairs of proceeding

Failure to notify the Fort Mohave Tribe of Indians or the Bureau of Indian Affairs of the above entitled proceeding, or affording them an opportunity to be heard is clearly contrary to the rules governing that proceeding[2] and violative of the Constitutional principles respecting due process. A chronicle of the events leading up to the decision of March 15, 1967, establishes the total failure to give notice to the Indians or to this Bureau as required by law, equity, and good conscience.

California's claims to these lands date back in excess of a half century—an application let it be added which was filed 60 years subsequent to the Swamp and Overflow Act of September 28, 1850. The record discloses California's repeated attempts to secure title to these lands and repeated rejection of the claims. In that connection reference is made to a letter dated June 24, 1914, from the then Assistant Commissioner of the General Land Office, to California's State Surveyor General. There it is recited that California's application dated March 5, 1910, claiming the lands here involved, was rejected July 9, 1912, "subject to the usual right of appeal.

"The records of this office fail to show that an appeal was filed in this case, and the matter is now res adjudicata." Seemingly the matter was and should have been closed, and California's claims should now be barred.

Events which transpired since that long ago date are not readily ascertainable from the protracted record. In any event nothing of substance occurred until April 24, 1959, when California resusitated its ancient application claiming title to these lands. There is most probably a coincidence between the unresolved issues in *Arizona* v. *California* and that application.[3] What is clear beyond question, however, not merely probable, are these two factors:

1. The Supreme Court succinctly rejected the ruling of the Special Master in regard to the lands in these terms: "We disagree with the Master's decision to determine the disputed boundaries of the * * * Fort Mohave Indian Reservation."[4]

2. The claims of the Indians, this Bureau and the United States on behalf of the Indians as asserted by it in the last mentioned Supreme Court case were known and recognized by every one concerned with the proceeding to which this consideration is directed.

No notice was given to the Indians or this Bureau of California's April 1959 application. In due course—April 22, 1964—Harold E. Waldo, Chief, Lands Adjudication Section, rejected California's revised claims. Substance of the Waldo opinion was stated in these terms: "The evidence cited above satisfactorily shows that the lands in question were not in existence in the State of California at the date of the swamp-land grant. [September 28, 1850]" This opinion was not served upon the Indians or the Bureau of Indian Affairs. By a notice dated May not served upon the Indians or the Bureau of Indian Affairs. By a notice dated May 22, 1964, California announced its "wishes to and hereby does appeal to the

[2] 43 C.F.R. 1850 et seq.
[3] 373 U.S. 546 (1962).
[4] 373 U.S. 546, 601 (1962).

Director of the Bureau of Land Management * * * the Decision of * * * Waldo * * *." That notice was not served upon either the Indians or the Bureau of Indian Affairs.

Affirming the Waldo decision rejecting California's application, James F. Doyle, Chief, Office of Appeals and Hearings, in his opinion dated September 30, 1964, had this, among other things, to say: "A report of field examination states that the subject land is covered by a dense stand of Tamarisk trees which can be cleared and placed in agricultural production; the soil is of light to medium texture; and bordering private land on the north is planted to sudan and irrigated pasture."—what Mr. Doyle could have added—but did not—is that the Mohave Indians since time immemorial in the exercise of their aboriginal title had successfully farmed these lands—all as more fully reviewed.

As to the character of California's claims—so frequently rejected—Mr. Doyle in his September 30, 1964, decision points out: "The Department has also ruled that after the lapse of more than thirty years a claim under a Congressional grant must be construed strictly against the grantee and the burden of proof is on the claimant. * * *

"In this case there is a lapse of more than a century." Again there was no service of the opinion of Mr. Doyle upon the Fort Mohave Indians or this Bureau, albeit the Supreme Court had by the date of his opinion left open for future decision "* * * the disputed * * * [boundary] of * * * the Fort Mohave Indian Reservation." [5] Noted is this salient fact:

On December 7, 1964—shortly after Mr. Doyle's opinion—the Commissioner of Indian Affairs in furtherance of this Bureau's consistent and well known claims on behalf of the Indians regarding these lands, requested the Secretary of the Interior to direct a resurvey of them.

In a letter dated December 13, 1965, the State of California requested: "* * * that a hearing be held, as authorized by the Act of July 23, 1866, Rev. Stats., Section 2488, as amended, 43 U.S.C. 987." Based upon that request Ernest F. Hom, Assistant Solicitor Land Appeals, in a Departmental decision dated January 18, 1966, A–30387, reviewed the Doyle opinion, recited California's request for a hearing and, among other things, stated: "* * * pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is set aside, and the case is remanded to the Bureau of Land Management for further action consistent with this decision." Though the *Doyle opinion* was of extreme importance to the Indians neither they nor the Bureau of Indian Affairs were notified that it was set aside or that the matter would be heard before the Bureau of Land Management. To whom service was made of that opinion is unclear from the record.

On January 24, 1966, James F. Doyle, Chief, Office of Appeals and Hearings, signed a document entitled "Decision . . . Hearing Ordered"; alluded to the above mentioned Departmental Decision A–30387, and stated: "a hearing is hereby directed to be scheduled by the Chief Hearing Examiner, Sacramento, California" and ruled "In such a proceeding the burden will be upon the State to show clearly that the lands claimed were, on September 28, 1850, swamp and overflowed, made unfit thereby for cultivation." Distribution of that order for hearing—absent the Indians or the Bureau of Indian Affairs—is shown below.[6]

There was issued on April 25, 1966, a "Notice of Hearing" containing the statement that "All parties interested in the above proceeding are directed to appear * * *" and setting forth this statement of "Legal Authority and Jurisdiction":

"The hearing herein ordered will be held under authority granted by act of September 28, 1850, Rev. Stat. 2479–2488 (1875) 43 U.S.C. 982–987, as amended, 43 U.S.C. 987 (1964). The hearing will be conducted under the Department of Interior Hearings Procedures, 43 CFR Part 1850."

Again without including the Bureau of Indian Affairs or the Indians—undoubtedly the most vitally interested—service was made upon the following:

"Distribution: Deputy Attorney General, State of California, Attn. Paul M. Joseph, 500 Wells Fargo Bldg., 500 Capitol Mall, Sacramento, Calif. (Cert.). Regional Solicitor, U.S. Dept. of the Interior, 7759 Federal Bldg., 300 North Los Angeles Street, Los Angeles, Calif. (Cert.). California State Lands Commission, Attn. Kenneth C. Smith, Public Lands Officer, 5th Floor, 1320 K Street, Sacramento, Calif. 95814."

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[5] 373 U.S. 546, 601 (1962).

[6] State Lands Commission, State of California; Thomas C. Lynch, Attorney General, State of Califorina; Paul M. Joseph, Deputy Attorney General; Office of Hearing Examiners, Sacramento—w/case record LA 0164001; D–ESO—w/copy Department Decision; Eng.—w/copy Department Decision; SD (California)—w/copy Department Decision; D&LO (Riverside)—w/copy Department Decision; Case File; Appeals and Hearings Reading File; DDRF 1 & 2; AMF.

In due course the hearing was commenced in Sacramento, California, Monday, September 19, 1966. These are the appearances:

"George H. Wheatley, Office of Regional Solicitor, Department of the Interior, New Federal Building, 300 North Los Angeles Street, Los Angeles, California, appearing on behalf of the United States of America.

"Paul M. Joseph, Deputy Attorney General, Department of Justice, Fifth Street & Capitol Mall, Sacramento, California, appearing on behalf of the State of California."

Oral and documentary evidence were offered by California and the Bureau of Land Management in support of their respective claims. At no time was there recognition that the Indians and the Bureau of Indian Affairs claimed the lands in question as being part of the Fort Mohave Indian Reservation.

In response to the December 7, 1964, request from the Commissioner of Indian Affairs to the Secretary of the Interior for a resurvey of the Fort Mohave Indian Reservation, there was issued on February 10, 1967, an opinion from the Associate Solicitor, Indian Affairs, declaring that: "In my opinion, there is no legal justification for a resurvey of the 1928 western boundary." On March 15, 1967, a decision based upon the above mentioned September 1966 proceeding was issued by the Hearing Examiner finding, among other things: "That on the critical date of September 28, 1850, the land encompassed in the State's application was public land of the United States of America within the State of California;" and concluding that as to the lands in question, "the State of California is entitled to a clear listing of the land applied for as swamp and overflowed land" with certain exceptions.

Distribution of the March 15, 1967, decision was identical with the notice of hearing to which reference was made and did not include either the Indians or the Bureau of Indian Affairs.

It is urged by California in its letter of July 19, 1967, that the petition of the Commissioner of the Bureau of Indian Affairs is not "timely". Yet California leaves unchallenged this averment in the motion to intervene of July 11, 1967, that, "Neither this Bureau nor the Fort Mohave Tribe of the Fort Mohave Reservation had notice of the above entitled proceeding or the March 15, 1967, decision emanating from it * * * neither this Bureau nor the Tribe had, nor were they afforded, an opportunity to be heard in regard to their claimed rights and interests in the lands involved in the proceeding and those lands to which the decision of March 15, 1967, pertains."

Having failed to reply to that allegation, California in effect admits the truth of it—the truth of which is, moreover, fully supported by the preceding documentation. As a consequence there is a clear violation, as stated above, of the rules [6a] pursuant to which this proceeding was brought, conducted and concluded, which required all parties having an interest to be notified. Justice Holmes' succinct statement that the rights of the United States "cannot be tried behind its back," [7] is equally applicable to this Bureau and to the Fort Mohave Tribe of Indians who will experience irreparable damage if they are deprived of their property claimed by California.

California as a party to the case of *Arizona* v. *California* must, of course, be charged with knowledge that the boundary dispute respecting the Fort Mohave Indian Reservation was left unresolved and today is unresolved. Accordingly, California itself had a responsibility not to proceed with its claim in the absence of indispensable parties—this Bureau and the Indians—and cannot at this date successfully raise the question of "timeliness" of this intervention.

[6a] 43 C.F.R. 1850.

[7] Louisiana v. Garfield, 211 U.S. 70 (1917).

Determination that aboriginal title to the lands here involved was in the Mohave Tribe on September 28, 1850:

Title to the lands here involved [8] resided in the Mohave Tribe of Indians from time immemorial on September 28, 1850 and some years, at least, thereafter. That determination of Indian Title was made March 19, 1959, antecedent to California's application under the Swamp and Overflowed Lands Act [9] which was not filed until April 27, 1959.

Attached to this memorandum, as an appendix, and made a part of it by reference, are the Findings of Fact, Conclusions of Law and Opinion of the Indian Claims Commission in the proceedings entitled "Mohave Tribe of Indians * * * Claimants, v. United States of America, Defendant" Dockets Nos. 283 and 295. Contained in that appendix is a review in depth of the facts and the law which gave rise to the adjudication respecting the title of the Mohaves and the date when that title to their lands passed to the National Government. Precise data when that title passed depends upon whether the lands or part of them were in the Territory of Arizona or in the State of California—a factor very much in doubt; a factor let it be emphasized greatly in need of final resolution. Irrespective of their location, that transfer of the Mohave Indian title to the lands claimed by California did not and could not have transpired until subsequent to

"* * * the critical date of September 28, 1850" when the first finding of the March 15, 1967 decision declares, clearly in error, that they were "public land of the United States of America within the State of California." That the lands in question were not "on the critical date of September 28, 1850 * * * public lands [a term of art] * * *" is well stated in the attached appendix from which this excerpt is taken:

"The Commission further concludes that the United States acquired the Indian title to those lands in California within the areas described above on March 3, 1853, and extinguished the Indian title to the lands within those areas which were in what are now the States of Nevada and Arizona, on March 3, 1865." [10]

Pertinent in regard to the last quoted excerpt from the accompanying opinion of March 19, 1959, is this fact: By a Stipulated Settlement the United States of America paid to the "Indians of California" $29,100,000 based upon a taking by it on March 3, 1853.[11]

Pertinent likewise is this fact: The United States of America was defendant in the Mohave Indian proceedings set forth in the appendix to this memorandum; the United States of America was defendant in the case of the "Indians of California" which it settled on the basis of a March 3, 1853, taking. As a consequence neither the United States nor any of its agencies can now correctly assert that on the "critical date of September 28, 1850" the lands of the Mohave Indians were "public lands" of the United States of America.

This incongruity is presented: One agency of the United States of America is declaring that title to Mohave Indian lands resided in California on September 28, 1850, whereas another agency is preparing to determine the funds to which the

[8] See California's letter dated April 24, 1959, filed April 27, 1959, Request for Swampland Certification:

Lands in T. 10 N., R. 22 E., S.B.M.

	Acres
Section 3: Lot 3	6.73
Section 10:	
Lot 1	21.65
Lot 2	36.72
W2 NE4	80.00
E2 SW4	80.00
SE4	160.00
Section 11:	
Lot 1	15.07
Lot 2	30.24
Section 14:	
Lot 1	46.50
Lot 2	22.51
Lot 3	38.35
Lot 4	14.20
SW4 NW4	40.00
W2 SW4	80.00
SE4 SW4	40.00
Section 15:	
E2	320.00
E2 NW4	80.00
Section 22:	
Lot 1	39.83
Lot 2	39.92
Lot 3	39.43
Lot 4	39.16
Lot 5	38.75
Section 23:	
Lot 1	30.02
Lot 2	45.82
Lot 3	12.41
Lot 4	38.88
Lot 5	30.74
Lot 6	14.78
NW4	160.00
N2 SW4	80.00
Total	1,721.71

See excepted area Decision March 15, 1967, page 12, Conclusion of Law.

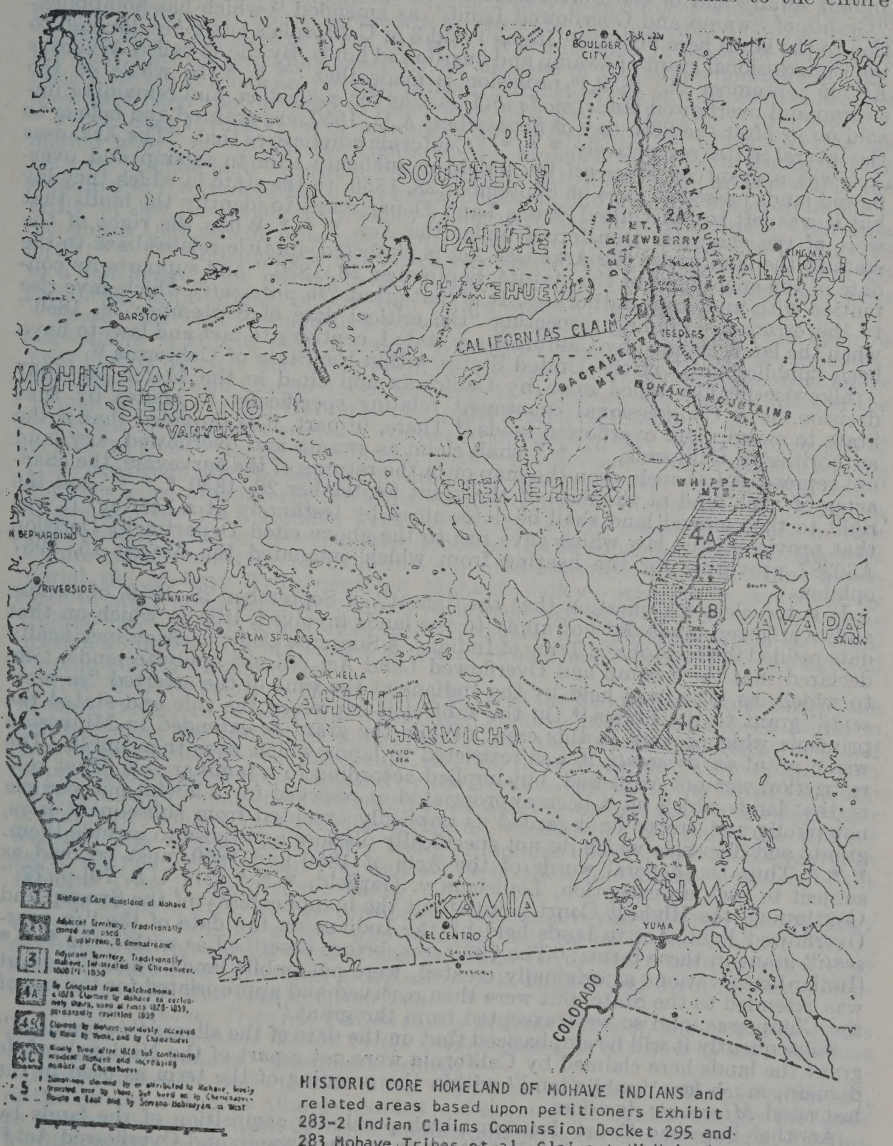
[9] 43 U.S.C. 981 et seq.

[10] Appendix, 7 Ind. Cl. Comm. 219, 265 (March 19, 1959).

[11] See Final Determination or Judgment dated July 20, 1964, entered by the Indian Claims Commission, Consolidated Dockets Nos. 31, 37, 80, 80D, 347; Findings of Fact, Opinion of the Commission dated July 20, 1964, 13 Ind. Cl. Comm. 369 et seq., and related documents.

Mohave Indians are entitled for those same lands based upon a "taking" of them on March 3, 1853.[12]

There has been set forth above a description of the lands which California claims.[13] That they are lands title to which resided in the Mohave Tribe of Indians on the "critical" Swampland date of September 28, 1850 and until at least March 3, 1853, is free from doubt. Reference in that connection is made to Finding 23 of the appendix.[14] In that finding there is cited Exhibit 283–2, Plate 1 of this memorandum. That plate is a scaled-down reproduction of Exhibit 283–2. It will be observed from Finding 23 and Plate 1 that title was in the Indians to the entire



HISTORIC CORE HOMELAND OF MOHAVE INDIANS and related areas based upon petitioners Exhibit 283-2 Indian Claims Commission Docket 295 and 283 Mohave Tribes et al, Claimants V United States of America.

[12] See appendix, "Interlocutory Order" March 19, 1959, from which the United States of America did not appeal and concerning which the time for appeal has long since expired, 25 U.S.C. 70s. Moreover, in the light of the settlement of the claims of the "Indians of California" there is no basis upon which the United States may now contest the date of taking.

[13] See footnote 9.

[14] 7 Ind. Cl. Comm. 219, 240, 241.

Mohave Valley—and far more—encompassing the bottom lands to which California makes its claim. Noteworthy is the fact that the Mohaves held title to lands on both sides of the Colorado River for a very extensive reach of that stream, embracing lands east into Arizona and west into California to the mountains named in Finding 23.

Mohave Indian lands were not subject to "the grant, September 28, 1850" upon which California asserts its claims and the March 15, 1967 decision is predicated:

Main thrust of California's opposition to the intervention by the Bureau of Indian Affairs and of the Fort Mohave Indians is based upon the Act entitled "Grants of Swamp and Overflowed Lands" as amended [15] which has no application to the lands here involved. Items 1 and 3 of California's letter are directed to the Congressional grant of swamp and overflowed lands. By the so-called Arkansas Act of September 28, 1850,[16] provision is made that "* * * the whole of the swamp and overflowed lands, *made unfit thereby for cultivation*, and remaining unsold on or after the 28th day of September, A.D. 1850, are granted and belong to the several States respectively * * *." California emphasizes that, "The Arkansas Act was a grant *in praesenti* by which an inchoate title to swamp and overflowed lands passed at once on September 28, 1850, to the state in which they lay but it was left to the United States Land Department to identify the lands that were of the character transferred under the Act. * * * When the right of the state to the land under the Arkansas Act is perfected, its title relates back to the date of the enactment of the statute, September 28, 1850," and supports its contention with numerous authorities. It is that grant "*in praesenti*" which gave rise to the erroneous Finding respecting "the critical date of September 28, 1850" when the lands claimed by California are stated, contrary to fact and law, to have been "public lands" of the United States within the State of California.[17]

Likewise heavily relied upon by California and cited in the March 15, 1967 decision, is a Congressional enactment relating specifically to claims by that State to swamp and overflowed lands.[18] There, in part, it is provided that if the authorities of California, "* * * shall claim as swamp and overflowed, any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant September 28, 1850 * * *" and the right to the claimed land shall be determined by testimony at a hearing. It was that proviso of the law which gave rise to the above cited Department Decision A30387 providing for the hearing from which emanated the March 15, 1967 opinion.

It is too clear for question that the "grant" of September 28, 1850, of swamp and overflowed lands did not apply to the lands involved, title to which on that date resided in the Mohave Tribe of Indians. A Supreme Court decision specifically declared that the Swamp and Overflowed Land Act did not apply to lands, title to which, as here, was held by the Indians at the time of the asserted "*in praesenti*" grant to the States.[19] On the subject it expressed the rule and stated the principle which govern in this case: "While the grant as extended to Minnesota was a grant *in praesenti*, it was restricted to lands which were then public. The restriction was not expressed, but implied according to a familiar rule. That rule is, that lands which have been appropriated or reserved for a lawful purpose are not public and are to be regarded as impliedly excepted from subsequent laws, grants and disposals which do not specifically disclose a purpose to include them. * * * Thus the general words of the Acts of 1850 and 1860 must be read as subject to such an exception, Louisiana v. Garfield, * * * [211 U.S. 70] p. 77." Continuing ,the Highest Court pointed out the inapplicability of the Swamp and Overflowed Land Act to lands held by the Indians on the date of the "*in praesenti*" grant in these terms: "The 706 acres, before described as within the * * * [Indian] reservations as originally created, were not public lands when the grant was extended to the State, but were then reserved and appropriated for the use of the Chippewas, and so were excepted from the grant."

Subsequently it will be emphasized that on the date of the alleged "*in praesenti*" grant the lands here claimed by California were not a part of the National public domain, much less "public land" within the meaning of the term as used in the last cited *Minnesota* decision.

Another Supreme Court decision which precludes acquisition of the lands by California, involved claims by that State under the Swamp and Overflowed Act.[20]

[15] 43 U.S.C. 981 et seq., particularly 987.
[16] 43 U.S.C. 982 et seq.
[17] Decision March 15, 1967, page 11, Finding of Fact No. 1.
[18] 43 U.S.C. 987.
[19] United States v. Minnesota, 270 U.S. 181, 206 (1925).
[20] United States v. O'Donnell, 303 U.S. 501, 509 (1937).

There, as here, the lands claimed by California were acquired by the National Government subsequent to the "*in praesenti*" grant under the act in question. What the Supreme Court said there is controlling here: "The Swamp Lands Act of 1850 was effective to transfer an interest in the lands described in the Act, only so far as they were part of the public domain [which most assuredly the Mohave lands were not] of the United States and thus subject to the disposal of Congress." Citing *Minnesota*, alluded to above, the Court stated: "By its terms the Swamp Lands Act did not include [1] swamp lands which the Government had sold, and [2] *it could not include lands which the Government had not acquired* [including Mohave Valley land now claimed by California, see Plate 1 and Finding 23] or [3] free any of them of obligations to which they were subject when the Act was passed." Then the Court proceeded to reiterate the principle that the phrase "public land" is a term of art in the law: "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." [21] (Emphasis supplied)

Pelton cites favorably both *Minnesota* and *O'Donnell* from which excerpts are quoted above to sustain the rights of the Mohave Indians, in distinguishing between "public land" which is "unqualifiedly subject to sale" and to which the Swamp and Overflowed Land Act has application, and the land not open unqualifiedly to sale, to which the Swamp Lands Act has no application.[22] California recognizes that salient principle—controlling here—when it states in its July 19 letter: "* * * Indian lands not previously specifically appropriated or reserved to a particular tribe passed to the State, although not those which had been specifically appropriated or reserved. *United States* v. *Minnesota, supra*."

There California distinguishes between "public lands" and lands not open to acquisition. It is thus most relevant to consider Finding 25(a) of the appendix. That finding declares that Congress did not constitute the lands in question under the California Land Claims Act of March 3, 1851 (9 Stat. 452, Sec. 13) part of the "public domain" of the United States, until March 3, 1853.

Genesis of California's error is contained in this sentence taken from page 5 of its July 19 letter: "So far as we know, neither the Bureau of Indian Affairs nor the Tribe are occupying the land in question nor have they ever occupied the land." That sentence underscores the indispensible character of the Bureau of Indian Affairs and the Fort Mohave Tribe as parties to this cause. Reference in that connection is made to the exhaustive Findings in the appendix which declare with infinite clarity, contrary to California's quoted assertion, that since time immemorial the Mohave Tribe occupied Mohave Valley—occupied it moreover by force of arms when necessary, albeit with stone-age weapons—no match for the United States Army, a historical fact overlooked by California. From the Commission's opinion this statement is taken—which must be read in the light of Finding 23 and Plate No. 1:

"The Mohave Valley on the Colorado River is the historic core homeland of the Mohave Tribe. In or near this valley the Mohave Indians have been found in numbers since the first white contact by Onate, the Spaniard, in 1604–1605, and Padre Garces, the Spanish missionary, in 1776. In 1826, James Pattie an American trapper and his party were attacked by the Mohave Indians in the Great Colorado Valley, probably somewhere between Parker and Poston and again a few days later probably in Mohave Valley. Jedidiah Smith, in 1826 and 1827, found the Mohave living in large numbers in Mohave Valley. American officers, such as Sitgreaves in 1851, Whipple in 1854, and Ives and White in 1858, found large numbers of the Mohave Tribe in the Mohave Valley.

"The Mohave Tribe may be considered predominantly a sedentary people. They were mostly a farming people who planted their farms in the Mohave Valley, depending on the annual flood of the Colorado River which both irrigated their fields and fertilized them with a deposit of silt. They raised corn, melons, pumpkins, beans and other varieties from seed. * * *

"*That the Mohave Tribe had Indian title to Mohave Valley at, and long prior to, the acquisition of said lands therein by the United States, is admitted by all authorities on the Mohave Indians.*" (Emphasis added) [23]

From prehistoric times to date either the Mohave Tribe, the War Department, or the Bureau of Indian Affairs occupied and claimed the right to occupy the lands to which California's April 27, 1959, application pertains. Commencing at Finding 6 of the appendix will be found a chronicle of the history of the Mohave Valley.[24]

[21] 303 U.S. 501, 510 (1937).
[22] Federal Power Commission v. Oregon, 349 U.S. 435, 448 (1954).
[23] Appendix, 7 Ind. Cl. Comm. 219, 252–253.
[24] 7 Ind. Cl. Comm. 219, 222.

Accompanying Plate 2 sets forth the area embraced within Camp Mohave and the Hay and Wood Reserve, which encompasses the lands claimed by California. At all times here relevant this Bureau and the Fort Mohave Indians have claimed those lands. California complains that the request to intervene "* * * wholly fails to state any facts upon which its right to intervene may be based." It then adds a non-sequitur by alluding to this averment in the July 11, 1967, motion to intervene: "* * * this Bureau and the Tribe have at all times here relevant asserted claims to those lands as being part of the Fort Mohave Indian Reservation * * * and deny that California or anyone else, has any right, title or interest in or to them." There is thus pleaded the ultimate fact of title claimed by the Bureau and the Tribe, not parties to this cause. As a consequence it is impossible to perceive a stronger statement upon which a right to intervene could be predicated.

When the United States of America settled the claims of the "Indians of California" for $29,100,000 as reviewed above, based upon a taking date of March 3, 1853, it in effect adopted the principles enunciated by the Indian Claims Commission in the appendix to this memorandum. Similarly when it did not appeal the opinion of the Commission set forth in the appendix, the United States of America tacitly accepted the principles which were enunciated. Those principles based upon the *Santa Fe Decision* are crucial here.[25] Involved in the *Santa Fe Decision*[26] was the title of the *Walapai Tribe*, neighbors immediately to the north and east of the Mohave Core Homeland as shown on Plate 1 and Finding 23 in the appendix.

In the *Santa Fe Decision* there is reviewed in great detail the title of the Walapais to the lands comprising their "ancestral home." [27] That description comports fully with the Findings in the accompanying appendix in regard to the "Historic Core Homeland of Mohave." Title to that "Historic Core Homeland" which resided in the Mohaves as *Sante Fe* points out, "* * * is considered as sacred as the fee simple of the whites." [28] Subsequently the Court added that the authority over Indian lands is within the purview of the Congress the power of which "in that regard is supreme." Continuing, the Court stated that " 'the exclusive right of the United States to extinguish' Indian title has never been doubted." [29] However, it likewise declared that the National Government had a firmly established policy of respecting the aboriginal Indian title and that "certainly it would take plain and unambiguous action to deprive the Walapais of the benefits of that policy." [30]

Applying the principles of the *Santa Fe Decision* as enunciated by the Highest Court in regard to the *Walapais*, to the facts which the Indian Claims Commission found respecting the Mohaves, resulted in the declaration by the Commission that the Mohave Title was not taken from them by Congress until March 3, 1853, in the State of California or March 3, 1865, in the States of Arizona and Nevada. As a consequence there is no merit in California's assertion that the United States—in clear violation of its policy to recognize Indian title—would have stripped from the Mohaves title to the lands in question and given an "*in praesenti*" grant to California on September 28, 1850.

Mohave Lands claimed by California were not subject to the Swamplands Act by its express terms:

By express provision the Swampland Act applied to lands which were "made unfit thereby for cultivation." Yet the Indian Claims Commission expressly found that the Mohaves were "farming people"—from time immemorial—"depending on the annual flood of the Colorado River which both irrigated their fields and fertilized them with a deposit of silt." [31] In that connection California's Supreme Court specifically held that: "* * * if land subject to overflow was on September 28, 1850, such that annually, after subsidence of the water, a crop of wheat, rye, barley, oats, corn, peas, or beans could be raised on it, it was not swamp and overflowed land within the meaning of the grant." [32]

It will be recalled that the September 30, 1964, rejection of California's claim by the Bureau of Land Management states the land "can be cleared and placed in agricultural production" all in keeping with the Mohave tradition so well described in the appendix.

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[25] Appendix, 7 Ind. Cl. Comm. 219, 260.
[26] United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941).
[27] 314 U.S. 339, 345 (1941).
[28] 314 U.S. 339, 345 (1941).
[29] 314 U.S. 339, 347 (1941).

[30] 314 U.S. 339, 346 (1941).
[31] Appendix, 7 Ind. Cl. Comm. 219, 252.
[32] 40 Cal. Jur. 2d., Public Lands, p. 515, section 22, citing Keeran v. Allen, 33 Cal. 542.

Due to the nature of the lands in question this Bureau and the Fort Mohave Tribe are most assuredly entitled to be heard relative to the character of the Mohave Homeland which will further demonstrate the inapplicability of the Swamplands Act and the alleged "*in praesenti*" grant to California on the "critical" date of September 28, 1850.

Right of this Bureau and the Indians to intervene or alternatively to have dismissed the hearing California requested for the want of indispensable parties:

Finally California complains that the Act pursuant to which it seeks title to the lands here involved, does not contemplate intervention by this Bureau or the Fort Mohave Tribe of Indians. Ignored is that fact that the proceeding is in effect before the Secretary of the Interior who by reason of the Constitution of the United States and enabling legislation is constituted Trustee for the Indians. It is inconceivable that he would violate his trust. There is thus presented the alternative—intervention or dismissal of California's claim for want of indispensable parties.

Erroneous Blout Survey of 1928 subject of present intensive investigation

Absent the Fort Mohave Tribe and the Bureau of Indian Affairs, there was not placed in issue in the above entitled proceeding the Blout Survey of 1928. As a consequence there could be neither a contest in regard to, nor a ruling upon that survey. Purportedly that survey stripped from the Indians approximately 3,500 acres of land including those claimed by California in its revived application.

This Bureau and the Fort Mohave Indians have refused to accept the Blout 1928 Survey. Indeed, it was that refusal to accept the survey which gave rise to the December 7, 1964, memorandum to the Secretary of the Interior requesting a resurvey of that part of the Fort Mohave Indian Reservation known as the Hay and Wood Reserve shown upon Plate 2 of this consideration. This Bureau was, of course, instrumental in having the issue raised before the Supreme Court.[33] However, as previously reviewed, the Court then declared that it was unnecessary to resolve the issue at that time.

Historically the Mohave Indians held title to the Mohave Valley, all as disclosed on Plate 1. Included were, of course, the bottom lands of that Valley to which California's application relates and to which the March 15, 1967, decision pertains. Respecting the Indian claims to these lands—concerning which the world is charged with notice—is the Constitution and Bylaws of the Fort Mojave Tribe of the Fort Mojave Reservation—Arizona, Nevada, and California. There in specific terms the Indians assert their rights to the Hay and Wood Reserve established in 1870, effectively rejecting the Blout 1928 Survey. Strength is added to their claims to those lands—a part of their immemorial heritage—through the approval of those Bylaws by the Secretary of the Interior.

Prior to receiving knowledge of the proceeding or the March 15, 1967, decision emanating from it, this Bureau in cooperation with the Fort Mohave Tribe, had undertaken an intensive investigation respecting the boundary of the Hay and Wood Reserve. That investigation is presently under way. Preliminary results of that undertaking fully support the boundary lines of the Hay and Wood Reserve as originally established and demonstrate that the Blout Survey of 1928 is grossly in error.

Resolution of the issues presented by the conflicting surveys was commented upon in the February 10, 1967 opinion, to which reference has been made, as follows:

"I cannot, therefore, concur in the view that the Master's Report has definitely determined the boundary question [the Supreme Court having refused to accept that phase of the Report]. Proposals for legislation to add the 'removed' area to the Hay and Wood Reserve have been presented to Congress in the past, and, though Congress has never acted, legislation could conceivably be presented in the future. Judicial determination of the question may also be sought."

Quite obviously neither the legislative nor the judicial remedy would be available if the March 15, 1967, decision awarding to the State of California title to the lands, is allowed to stand.

Whatever course is ultimately adopted in regard to this phase of the matter, it is apparent the present investigation must be completed and to the extent possible, the issues must be resolved within the Department of the Interior. Whether a judicial determination is sought—as suggested by the Associate Solicitor in his February 10, 1967, opinion—should be given full and careful consideration.

In the event it is concluded that the erroneous Blout 1928 Survey is or has become an issue in this proceeding, then it is imperative this Bureau and the Fort

[33] 373 U.S. 546, 601 (1962).

Mohave Tribe of Indians be heard in regard to that survey along with the other crucial issues which have been presented. This Bureau and the Fort Mohave Indians claim title to the lands in question based upon the original Executive Order of March 30, 1870, which established Camp Mohave and the Hay and Wood Reserve, and by the Executive Order dated September 18, 1890, which transferred those lands to the Department of the Interior for the Fort Mohave Indian Reservation. Any effort to reduce the areas set forth in those Executive Orders as depicted on Plate 2 of this memorandum, on the basis of California's claims or the grossly erroneous Blout Survey of 1928, could only transpire after both this Bureau and the Fort Mohave Tribe have had a full hearing by the Highest Court of competent jurisdiction which under the circumstances is the Supreme Court of the United States.

CONCLUSION

There have been reviewed in specific detail the fundamental reasons why the Bureau of Indian Affairs and the Fort Mohave Tribe of the Fort Mohave Reservation should be permitted to intervene and be heard in this proceeding. Failure to give notice to this Bureau or to the Indians is clearly violative of the rules under which the proceeding was conducted and violate the Constitutional rights of the Fort Mohave Indians. This Bureau and the Indians are indispensable parties to the proceeding and without them being made parties any further action short of dismissal and rejection of California's claim must of necessity be a nullity.

Title having resided in the Mohave Tribe of Indians to the lands here involved "* * * on the critical date of September 28, 1850 * * *" constitutes a compelling reason for the rejection of claims to title to those lands based upon an alleged "*in praesenti*" grant from the United States which on that "critical" date did not have title to them. Subsequent acquisition by the National Government of the title to those lands does not bring them within the purview of the Swampland Act under which California prosecutes its claims. Further, as emphasized above, the lands in question which the Colorado River by its overflow irrigated and fertilized for the Mohave Indians are not within the scope of the Swampland Act.

The lands claimed by the Indians and this Bureau duly constitute part of the Fort Mohave Indian Reservation. They were established by Executive Orders which described the areas encompassed, all as depicted on Plate 2 of this memorandum. Those Executive Orders have never been changed or the areas which they describe have never been reduced. Present investigations disclose the so-called Blout 1928 Survey as being grossly in error. If that grossly-in-error survey is relied upon in this proceeding, then as stated above, this Bureau and the Fort Mohave Tribe of Indians must of necessity in the exercise of their obligations and Constitutional rights fully be heard in regard to that survey.

Accordingly, this Bureau for itself and on behalf of the Fort Mohave Tribe of the Fort Mohave Reservation, respectfully requests that it be permitted to intervene in this proceeding and to take all other requisite steps to protect the rights and interests of the Indians all as stated in its motion to intervene dated July 11, 1967.

W. WADE HEAD,
Area Director, Phoenix Area,
(For Robert L. Bennett,
Commissioner of Indian Affairs).
RAYMOND C. SIMPSON,
Attorney for Fort Mohave Tribe.

(Reserving right to file Supplemental Points and Authorities).

9. MEMORANDUM CONCERNING TITLE OF QUECHAN TRIBE IN YUMA RESERVATION

U.S. Department of the Interior,
Bureau of Indian Affairs,
Washington, D.C., April 15, 1970.

Memorandum to: Mr. W. Wade Head, Area Director, Phoenix, Ariz.
From: William H. Veeder, Water Conservation and Utilization Specialist.
Subject: Title of the Quechan Tribe in the Yuma Indian Reservation, San Diego County, Calif.

SUMMARY

1. By an Executive Order dated January 9, 1884, there was established in San Diego County, California, the Yuma Indian Reservation. It contains 48,608.07 acres of land. It was bordered to the east and south by the Colorado River at the time of its establishment.

2. In early 1893 the Colorado River Irrigation Company was granted by the Congress of the United States a right-of-way for a canal across the Yuma Indian Reservation. That grant of right-of-way was expressly conditioned upon the Irrigation Company or its grantees "shall at all times * * * furnish the Indian occupants of the land situated on the lower side of the canal with water sufficient for all domestic and agricultural purposes and purposes of irrigation" under rules to be established by the Secretary of the Interior.

3. At the instigation of the Colorado River Irrigation Company the Commissioner of the Bureau of Indian Affairs in the year 1893 appointed three "Commissioners" to "negotiate" with the Quechans to cede some of their lands to the United States. Those "negotiations" were undertaken on or about November 24, 1893, continuing for three days.

4. These facts respecting the "negotiations" between the three "Commissioners" and the Quechans, are salient to this consideration for they evidence fraud, coercion, duress, forgery of names, and probably forgery of the entire document which culminated the "negotiations":

(*a*) The Quechans could neither read, nor write, nor understand English. Hence the Commissioners allegedly communicated with them through interpreters, one of whom allegedly could speak Spanish, English and the language of the Quechans. The "official" interpreter, a Bill Mohave, was illiterate and could not write his own name. There is no evidence he could read.

(*b*) Basis of all of the "negotiations" with the Quechans was that the above referred to Colorado River Irrigation Company would construct the canal across the Reservation as authorized by Congress, and the Quechans would irrigate the lands to be allotted to them below the canal. The prospect of irrigating Quechan lands by means of the Colorado River Irrigation Company canal was the only basis of the negotiations with the Quechans.

(*c*) Gross misrepresentations constituting fraud, were presented to the Quechans by the Commissioners, particularly in regard to the construction of the canal—never to be built—such as construction would commence December 1, 1893.

(*d*) At no time were the Quechans advised in the "negotiations" that they were to cede all of their Reservation—an additional element of fraud practiced upon the illiterate Quechans by the Commissioners.

(*e*) At the time of the alleged signing of an alleged document by the Quechans, these circumstances prevailed:

(i) A leader of the Quechans with several other Quechans who opposed the negotiations and the activities of the Colorado River Irrigation Company, were held in a Los Angeles jail without charge. There is evidence some of them were brutally whipped and one of them died in jail as a result of the whipping.

(ii) Policemen forced the alleged "marks" on seven legal-sized pages by 119 Quechans. Balance of the 203 alleged "marks" were forged according to the record.

(iii) Bill Mohave's—the alleged interpreter's—signature was forged both as a witness to the Indian "marks" and to the certification respecting the document allegedly explained by him to the Quechans and allegedly signed by the Quechans. Glaring feature of the fraud and forgery is that Bill Mohave's forged signature purports to witness his own "mark."

(iv) Forgery charges respecting the entire document allegedly "marked" by the Quechans can be supported from the records which contain as part of the documents received by the Bureau of Indian Affairs January 24, 1894, what is designated "* * * the work agreement with the Yuma Indians * * *" of the Commissioners. That "work agreement" differs drastically from the official document particularly in regard to the lands allegedly ceded.

(v) The seven pages upon which appeared the forged "marks" of the Quechans are separate from the alleged agreement and in all probability the alleged document presented to the Congress for approval was substituted for the alleged "working agreement," which simply underscores the unconscionable immorality perpetrated upon the Quechan Indians who are today suffering the results of the fraud and forgery practiced upon them.

(*f*) Date of the fraudulent and forged document signed by the "Commissioners" and allegedly "marked" by some of the Quechans is December 4, 1893. It was presented to Congress which approved it and adopted language to implement it by an Act dated August 15, 1894. In that Act Congress provided for the forfeiture of the right-of-way granted to the Colorado River Irrigation Company across the Yuma Indian Reservation, if construction of it was not commenced within three years after the date of the Act.

(*g*) Failure of the Colorado River Irrigation Company to construct the canal across the Yuma Reservation within the three-year period prescribed by Congress resulted in the forfeiture of its right-of-way. Thus the illusory canal which gave rise to the "negotiations" with the Quechans and the prime "come-on" used by the Commissioners fraudulently to induce some of the Quechans to accept some type of agreement, was never constructed.

5. Null and void and of no force and effect is the only appropriate reference which can be made to the alleged Agreement of December 4, 1893.

6. Abandonment of the December 4, 1893 Agreement ensued—albeit the Agreement was void in its inception and never performed either by the Quechans or the United States.

7. Proof of the abandonment of the 1893 fraudulent Agreement is overwhelming:

(*a*) For virtually a half century the Quechan Indians continued to occupy the Yuma Indian Reservation established by the Executive Order dated January 9, 1884.

(*b*) The Secretary of the Interior, through the Bureau of Indian Affairs, administered the Yuma Indan Reservation throughout that half century, leasing its lands and receiving rentals credited to the Quechans.

(*c*) None of the provisions of the fraudulent Agreement were carried out—the lands were never allotted pursuant to it; the lands were never sold pursuant to it; proceeds from the sale of lands were, of course, never paid to the Quechans in accordance with the fraudulent Agreement.

8. Ten (10) full years after the fraudulent Agreement of 1893 was allegedly signed, Congress passed the Act dated April 21, 1904 which provided that *irrigable* lands within (a) the Colorado River Indian Reservation and the Yuma Indian Reservation could be opened for entry pursuant to the Reclamation Act; (b) within those two Reservations five acres of the *irrigable* lands would be allotted to each Indian (increased in 1911 to 10 acres); (c) the settlers under the Reclamation Act would pay for the lands seized and taken from the Colorado River and Yuma Indians at a value "before reclamation".

So drastic are the differences between the 1893 fraudulent Agreement and the Act of April 21, 1904 that it is impossible legally to relate them in any way.

9. Twenty (20) years subsequent to the 1893 Agreement, and totally in disregard of its provisions some *irrigable* lands in the Yuma Indian Reservation which were within the Yuma Federal Reclamation Project, were allotted to some of the Indians. Again it is too clear for question that the allotments provided for in the fraudulent Agreement of 1893 differed drastically both as to the lands to be allotted and the methods to be utilized in the allotment of them, from the Reclamation Act and the Act of April 21, 1904 to which reference has been made.

10. There is no *historical* or *legal* relationship among the Agreement, the Reclamation Act or the April 21, 1904 Act as amended. That statement is fully supported by reason of the background of the Agreement and the Acts; the drastic differences are objectives, purposes, practices, and methods spelled out in them; the legislative history of all of the Acts involved.

11. Wholly in error both as to fact and law the two Solicitor's opinions dated respectively January 8, 1936, and June 12, 1968, purported to meld the 1893 fraudulent Agreement with the April 21, 1904 Act which subjected lands of the Colorado River Reservation and the Yuma Indian Reservation to the Reclamation Act of 1902. Irreparable damage to the Quechans flowed from those opinions for all of the non-irrigable lands to which the 1904 Act had no application were seized without legal right, by representatives of the United States without just compensation being paid to the Quechans.

12. By purporting to meld the widely disparate 1893 Agreement and the Act of April 21, 1904, the Solicitor's opinions in effect make operative a document which is null and void and of no force and effect; which for a half century the Department of the Interior had not considered operative; which Agreement, though null and void and never performed, is used against the Quechans to their continued irreparable damage.

13. Among the gravest and most damaging consequences flowing from the purported melding of the void 1893 Agreement and the 1904 Act are the positions being taken in the Quechan proceeding now pending before the Indian Claims Commission of the United States, Docket No. 320. Its present posture is as follows:

(*a*) The Quechans are claiming the 1895 Agreement is valid—that it has been breached respecting the sale of irrigable land roughly estimated at $500,000. Another breach of contract is the alleged failure to sell 8,000 acres of land for an alleged value of $4,000,000.00 in their "present state." The value of the non-irrigable land, with accretions to both irrigable and non-irrigable land, is not clearly stated. However, the principal concern appears to be the assertion that the Agreement is valid and if the position is sustained the Quechans lose the land based upon a wholly invalid arrangement which was never performed as required by the Agreement itself or by the Act of Congress purporting to approve it. (b) In defending against the claim, it is understood from conversations with Federal representatives, that the United States admits the contention of the Quechans that the agreement is valid, but states that there has been performance of it by reason of the Act of April 21, 1884, bringing some of the lands within the purview of the Federal Reclamation Act. In substance, there is thus not presented to the Indian Claims Commission the main thrust of this memorandum—the Agreement of 1893 was void in its inception and has never been performed and should, therefore, be declared of no force and effect.

14. Agencies of the United States, pursuant to the Solicitor's opinion are occupying large areas of lands which are irrigable in character and some of which are in fact actually being irrigated, but which those agencies assert are non-irrigable, all to the grave damage of the Quechan Indians.

Conclusions

1. As principal agent for the Trustee, United States of America, the Secretary of the Interior owes to the Quechan Indians the highest degree of fidelity, care, skill, and diligence. There has been a clear violation of that trust responsibility respecting the Quechan Indians in regard to their Reservation.

2. The Solicitor's opinions purporting to relate the void 1893 Agreement and the April 21, 1904 Act which is so widely disparate from that void Agreement, are predicated upon errors both as to fact and law.

3. It is unjust, unworthy and unfitting for representatives of this Nation to enforce against the Quechans the void 1893 Agreement upon tortured concepts of law, which has never been performed and never will be by reason of the greatly changed conditions brought about by the Act of 1904 which is wholly independent of the void 1893 Agreement.

4. The Indian Claims Commission before which the Quechan proceeding, Docket No. 320, is now pending, has power to hear and determine claims (i) in law or in equity arising under Federal laws: (ii) involving agreements between Indians and the United States which are based upon "fraud, dureas, unconscionable consideration;" (iii) taking or cessions of land by or to the United States without payment; (iv) based upon fair and honorable dealings that are not recognized by existing rule of law or equity.

5. There is not now presented to the Indian Claims Commission an attack upon the validity of the 1893 Agreement. Nevertheless in the present posture of this proceeding it is entirely possible to present to the Indian Claims Commission a challenge to the validity of the Agreement and to procure a ruling upon that validity or invalidity. It is concluded that the Indian Claims Commission has vested in it the discretion to entertain a petition to resolve that issue.

Recommendations

1. The Solicitor's opinions of January 8, 1936, and June 12, 1968, should be withdrawn.

2. Issues must be formulated and presented to the Indian Claims Commission charging that the December 4, 1893, Agreement is null and void and of no force and effect, seeking a determination by that tribunal to that effect. (The Indian Claims Commission does not appear to have authority to restore the land, but it clearly has the power to make the determination as to the void character of the 1893 Agreement opening the way to administrative action to recognize the Quechan title.)

3. Awaiting the determination by the Indian Claims Commission, it is desirable carefully to weigh the course to be purused by the Quechans and the Bureau of Indian Affairs contingent upon the acceptance of jurisdiction by the Indian Claims Commission and the rulings which would ensue.

4. In the event the Indian Claims Commission takes cognizance of the issue as to the validity or invalidity of the December 4, 1893 Agreement and rules it is invalid, administrative action by the Secretary of the Interior should be taken to recognize the Quechan title to the Yuma Indian Reservation subject to titles vested pursuant to the Act of April 21, 1904, as amended, and any other vested rights based upon authorization from Congress which would be in the nature of eminent domain with the Nation's obligation to pay just compensation to the Quechans for all legal takings.

WILLIAM H. VEEDER,
Water Conservation and Utilization Specialist.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
Washington, D.C., April 15, 1970.

Memorandum to: Mr. Wade Head, Area Director, Phoenix, Ariz.
From: William H. Veeder, Water Conservation and Utilization Specialist.
Subject: Title of the Quechan Tribe in the Yuma Indian Reservation, San Diego County, Calif.

As instructed by the Commissioner and under your direction, I have undertaken and completed an analysis of the facts and law as they relate to the basic issues respecting the title of the Quechan Tribe of Indians to the lands described in the Executed Order dated January 9, 1884, establishing the Yuma Indian Reservation, San Diego County, California. From that analysis there emerge these facts and conclusions. Based upon these facts and conclusions are recommendations as to the appropriate course to pursue by the Quechan Tribe and by the Bureau of Indian Affairs.

A. TRUST RESPONSIBILITY—FAILURE TO FULFILL THAT RESPONSIBILITY

(1) Under the Constitution of the United States there was delegated to the National Government the exclusive power and authority to act as Trustee for the Quechan Tribe.[1]

(2) Pursuant to its Constitutional authority the United States established the Yuma Indian Reservation by the Executive Order of January 9, 1884. That Reservation was bound to the east and south by the center line of the Colorado

[1] Constitution of the United States, 1787, Article I, Sec. 8, Cl. 3:
"Section 8: The Congress shall have Power: 'To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes; * * *'."
Constitution of the United States, 1787, Article IV, Section 3, Cl. 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."
Worcester v. *Georgia*, 31 U.S. 515, 559, 580–581 (1832).

River and the International boundary line with Mexico; to the west and north, by legal subdivisions.[2] It embraced 48,608.07 acres of land.

(3) As Trustee the United States, holding legal title to the Yuma Indian Reservation for the benefit of the Quechan Tribe, has the obligation to exercise the highest degree of fidelity, care, skill and diligence to protect and preserve the lands constituting the Reservation as described in the Executive Order of January 9, 1884.[3]

(4) In clear violation of the Nation's trust responsibility to the Quechan Tribe, Commissioners purporting to represent the United States procured by fraud or coercion or both, the alleged marks by some but not all of the Quechan Indians, who could not read, or write, or understand English, to a document dated December 4, 1893, purporting to cede to the United States as unknown but most assuredly a very substantial portion of their Reservation.[4]

B. HISTORY OF ILLEGAL SEIZURE AND RETENTION OF QUECHAN INDIAN LANDS—A CRIME AGAINST HUMANITY

History of the seizure of Quechan lands and the continued occupancy of those lands, resulting in grave poverty and degradation of the Quechan Indians, is a continuing crime against humanity which good conscience must of necessity reject as being unworthy conduct on the part of those purporting to act for this Nation. That history is a chronicle of deceit, fraud and duress practiced upon a helpless people. For this review that chronicle of events commences with the grant of a right-of-way to the long-since defunct promotional scheme fostered by the Colorado River Irrigation Company. Pertinent parts of the Act granting the right-of-way are as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there is hereby granted unto the Colorado River Irrigation Company * * * a right of way for an irrigating canal through the Yuma Indian Reservation in California * * *
>
> "SEC. 2. That the rights herein granted are upon the express condition that the grantee or grantees thereof shall at all times during the continuance thereof furnish the Indian occupants of the land situated on the lower side of the canal with water sufficient for all domestic and agricultural purposes and purposes of irrigation on such terms and under such rules and regulations as shall be prescribed by the Secretary of the Interior." [5]

By a letter dated September 1, 1893, from the Commissioner of Indian Affairs to the Secretary of the Interior, there was acknowledged a request from the Colorado River Irrigation Company for the appointment of a commission to negotiate with the Yuma Indians for the cession of a portion of their lands.

Shortly following the notice from the Secretary of the Interior to the Commissioner of Indian Affairs respecting the cession of the Quechan lands, the latter official appointed a commission to effectuate the cession in accordance with the following Act: "To enable the Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations any agreement thus negotiated being subject to subsequent ratification by Congress * * *." [6]

Having referred to the right-of-way grant to the Colorado River Irrigation Company and the urging by that Company for the cession of the Quechan Indian

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[2] (a) Executive Order dated January 9, 1884: "Beginning at a point in the middle of the channel of the Colorado River, due east of the meander corner to sections nineteen and thirty, township fifteen south, range twenty-four east, San Bernardino meridian; thence west of the line between sections nineteen and thirty to the range line, between townships twenty-three and twenty-four east; thence continuing west on the section line to a point which, when surveyed, will be the corner to sections twenty-two, twenty-three, twenty-six, and twenty-seven, in township fifteen south, range twenty-one east; thence south on the line between sections twenty-six and twenty-seven, in township fifteen south, range twenty-one east, and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections thirty-four and thirty-five, in township sixteen south, range twenty-one east; thence easterly on the international boundary to the middle of the channel of the Colorado River; thence up said river, in the middle of the channel thereof, to the place of beginning, be, and the same is hereby, withdrawn from settlement and sale and set apart as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided, however,* That any tract or tracts included within the foregoing-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded out of the reservation hereby made."

(b) See map of the Yuma Indian Reservation, U.S. Surveyor General's Office, San Francisco, California, August 17, 1896.

[3] American Law Institute, Restatement, Trusts, Sections 170, 174, 175, 176, 187; III Scott on Trusts, 3d ed., Section 187, p. 1501; The Menominee Tribe of Indians v. The United States, 101 Ct. Cls. 22, 23 (1944).

[4] Articles of Agreement dated December 4, 1893

[5] Act of February 15, 1893 (27 Stat. 456).

[6] Act of March 3, 1893 (27 Stat. 612). See letter dated October 24, 1893, from the Commissioner of Indian Affairs to Washington J. Houston, Esq., North Decatur, Georgia; John A. Gorman, Esq., Washington, D.C.; Peter R. Brady, Esq., Florence, Arizona; page 1.

lands to the end it could carry out its promotional scheme, the Commissioner of Indian Affairs admonished the Commissioners appointed to seize the Quechan lands that "No undue pressure should be used to induce them [the Quechan Indians] to consent to the cession * * *." Ensuing consequences as reviewed, reveal that the caveat last quoted was ignored.

Among other things, the Commissioners were directed by the Commissioner of Indian Affairs to procure an agreement from the Quechans—who, as stated, could not read, write or understand English—which "should provide for the disposition of the money to be derived from the cession. A sufficient amount should be applied to the construction of lateral ditches and other appliances for irrigation and a fund created, the interest of which shall be applied in the payment of water rents and for such other purposes as may be deemed expedient."

From the Colorado River Irrigation Company the Commissioners were directed to obtain a statement "of the terms and conditions upon which the company will supply the Indian occupants of the lands situated on the lower side of the canal with sufficient water for all domestic and agricultural purposes and purposes of irrigation and report your own views as to what terms would be fair and reasonable to the company."

(1) *Fraud, duress, coercion practiced upon the Quechan Indians to procure agreement dated December 4, 1893*

Background of the transaction giving rise to the agreement of December 4, 1893, underscores the sordid nature of it and the practice engaged in by alleged representatives of the United States in the procurement of it. As emphasized, the Quechans could not read, write, or understand English. Of great importance in regard to that alleged agreement are the statements under oath of Quechan Indians who were present when the document was purportedly accepted by the Indians. There follows part of the statements made under oath:

"*Q. Was there any attorney, any lawyer representing the Indians in these negotiations*?

"A. None whatever." [7]

As evidenced by the data submitted by the Commissioners, the Quechans were not advised of any intention of the Commissioners to take from them virtually their entire Reservation. Under oath this statement was made:

"*Q. Did Bill Mojave [a part-time interpreter] say that under the agreement the Indians would give up all the lands that was not allotted?*

"A. No.

"*Q. Did anybody else say anything about that?*

"A. Not that I know of." [8]

It is reported by the Commissioners that on Friday, November 24, 1893, the Quechan Indian Council met with the Commission. The alleged official reporter, Bill Mojave, was not present. As a consequence the proceedings were interpreted to the Indians from English to Spanish and from Spanish to Indian—there was a great deal lost by the Quechans in the interpretation. This recitation from the report of the November 24, 1893 meeting sets out the misrepresentation to the Indians in regard to the soon-to-be-defunct Colorado River Irrigation Company: "The Indians were asked if they knew about the ditch or Canal Company going to put a ditch through their reservation and that it was the purpose to allot them lands below the ditch giving to every Indian his own land." [9] The Chief of the Quechans answered that he knew of the plans to construct the Colorado River Irrigation Company canal but stated he wanted to know: "* * * how soon they are going to work on it [the canal] and when they are going to have it finished." To that inquiry the Commissioners advised the Chief through English, Spanish and Indian that he was informed that: "* * * work would be commenced about the first of December and finished as quickly as circumstances would admit. The interpreter did so and Chief Palma said he understands it and is satisfied."

That the Commissioners knew they were not telling the Quechans the truth in regard to the initiation of construction of the canal is evident from this statement from their official report dated January 24, 1894, two months after the assurances given the Indians.

"In this connection [the proposed route of the fictitious canal never to be built] it may be observed that the act granting the right of way to the Colorado River

[7] Before The Indian Claims Commission Of The United States, Docket No. 320; Deposition of Patrick Miguel, Jack Kelly, John Cash, and Steven Kelly, taken at Fort Yuma, California, on Wednesday and Thursday, the 28th and 29th days of November, 1951, page 8, lines 15, 16, 17.

[8] Before the Indian Claims Commission of the United States, Docket No. 320; Deposition of Patrick Miguel, Jack Kelly, John Cash, and Steven Kelly, taken at Fort Yuma, California, on Wednesday and Thursday, the 28th and 29th days of November, 1951, page 8, lines 18–22.

[9] Report on Quechan Indian Council meeting on November 24, 1893, page 1.

Irrigating Company made no provision as to the time when work was to begin on their projected canal. The Commission is of the opinion that there should have been some limit in this respect in that act, * * *." [10]

It is appropriate at this juncture to reiterate that the Commissioners were representing the Trustee United States to the Quechan Indians; that the Commission owed to the Indians the highest degree of fidelity, care and skill in the negotiations with them; that the Indians who could neither read nor write nor understand English, were not represented by counsel; that to entice the Indians to agree to the "cession" of some of their lands, the entire "sell" made to the Indians was that their lands would be irrigated; to state to the Indians that the Colorado River Irrigation Company would commence construction of the canal on December 1, 1894, knowing that there was no time prescribed for starting the work, is representative of the fraudulent course of conduct adhered to by the Commission appointed to procure the cession from the Indians. That the canal was never to be constructed and none of the other features of the proposed agreement were to be fulfilled as provided, discloses the generally reprehensible course of conduct of the officials involved and why the present use and occupancy by agents purporting to represent the United States is unconscionable.

In keeping with the course of conduct used to defraud the Indians of their properties were the false representations as to the lands to be allotted and to be "ceded":

"The interpreter was told to tell the Indians that it was the purpose *if they desired it to allot them lands below the ditch* so that they could get water on it, instead of waiting for the river to overflow, and that each one would own his own farm and they were told to indicate how many acres each wanted." [11]

Continuing, the report had this additional comment:

"The interpreter was then told to explain to the Indians that the Indians would only require a portion of the lands below the ditch and they were asked if they were willing that the remainder of the lands be ceded to the Government for their benefit and sold the money to be used to help them on their new farms, to pay water rents, buy seeds to educate their children." [12]

Thus it is clear the Commissioners in their statement to the Quechans allude only to lands below the never-to-be-constructed canal. No mention was made of the alleged "cession" of all of the lands of the Reservation totaling thousands of acres. That limited cession is, of course, in keeping with the recitations contained in the opening sentence of the formal report of the Commission dated January 24, 1894, which declares:

"The Commissioners appointed by you to negotiate with the Yuma Indians in California, *for the cession to the United States of portions of their reservation* under the provision of the Act of Congress approved March 3, 1893, (27 Stats., 612) now have the honor to report an agreement with said Indians, which is enclosed herewith." (Emphasis supplied)

Want of knowledge on the part of the Quechans confronted by the Commissioners is well demonstrated by these facts set forth in the first report of the Commission:

"Commissioner Brady then, with Agent Estudillo measured off an acre of land on the parade ground and showed the Chief and Indians what an acre of land is and they were asked if they fully understood it to which they replied that they did." [13]

The Indians were then asked:

"* * * to submit an offer of ten acres to each head of the family and five acres to each child under 18 years of age and ask them if they would be satisfied with that quantity of land. The question was put to a vote after being fully explained and discussed, and they all said they were satisfied." [14]

As set forth above, witnesses to the conduct of the Commissioners stated under oath that the Indians were not told that they would give up all the lands which were not allotted:

"*Q. Do you remember what was said* [*by the Commissioner*] *on the second* [*day*].

"A. The second day the same thing occurred only the old man stood on a chair and held up the proposed Agreement in his hand and said the Agreement is going to cut up your land into five-acre pieces and each man, woman and child will get five acres of land, free water will be given you, implements will be given you, seed will be given you, the land will be leveled, brush cleared, the land leveled and all you have to do is go out and farm it.

[10] Report of Commission dated January 24, 1894, page 9, last paragraph.
[11] Report on Quechan Indian Council meeting on November 24, 1893, page 2.
[12] Report on Quechan Indian Council meeting on November 24, 1893, page 3.
[13] Report on Quechan Indian Council meeting on November 24, 1893, page 2.
[14] Report on Quechan Indian Council meeting on November 24, 1893, page 3.

"Q. Did he say who was going to pay for all of that?

"A. The government was going to pay for all of that." [15]

In keeping with the sworn statements set forth above, this statement, likewise under oath, was made in regard to the proposition submitted to the Indians by the Commissioner who addressed them:

"Q. Did he say the Indians were to give up the rest of their reservation and that it was going to be public land?

"A. No, not a word along that line." [16]

For a trustee to confront its beneficiary, an illiterate people with no knowledge of the import of their acts, with the selection of the lands required to support a family, is in itself violative of the trust. To practice intentional deception as to the consequences of their acts and the devastation which befell the Quechans then and now, is despicable. As stated above, it is the intentional deception with the objective of depriving the Quechans of their lands, which is fraudulent *per se*. That fraud was insufficient, became clear to the Commissioners as will be reviewed. Hence they added to their fraudulent acts the elements of coercion and duress in their "negotiations" with the Quechans.

(2) Coercion and duress were practiced upon the Quechans, in addition to the deception which constituted fraud

Cryptic reporting is very much a part of the deception practiced upon the Quechans to defraud them of a large proportion of their Reservation as established by the Executive Order of 1884. Only mention of the jailing of Quechan leaders who resisted the deception practiced by the Commissioners upon them, is contained in this statement from the official report:

"Ex-Chief Miguel and eight Yuma Indians were in the Los Angeles jail, and as he had formerly been Chief of the Indians and at the present time a leader of a faction of them, the Commission thought it but proper to visit him and get his views. Walter Averspun, his Interpreter, who is also in jail told the ex-Chief and the other Indians of the object of the visit of the Commission and asked them their wishes in regard to taking their land in allotments. They all were in favor of doing so. They also said they knew of the proposed canal and hoped it would soon be built.

"Of all the known male adult Indians a total of 251, 203 signed the agreement; those in jail expressed their satisfaction with its terms, and the Commission believes that of the remaining 40, many of whom are at work off the reservation, nearly all would have signed had they been present." [17]

What the report did not, of course, state was that the Quechans who resisted the seizure of their land by fraud, duress, and coercion as practiced by the Commissioners, were whipped with blacksnakes and jailed in Los Angeles. Supporting the Commissioners' report that "Ex-Chief Miguel" who had opposed the activities of the Colorado River Irrigation Company was in jail, is a copy of a statemenr dated October 7, 1935, in the files of the Bureau of Indian Affairs, that the signet with four others had been whipped and that eight of the Indians, including Ex-Chief Miguel—had been sent to jail in Los Angeles. The statement refers to: Chief Miguel's resistance to the entry upon the Reservation by representatives of the Colorado River Irrigation Company, meetings and the employment of a lawyer named George M. Knight to assist the Indians; the ordered arrest and whipping of the writer of the statement at the direction of Mother O'Neil, stated to be superintendent at the time; the brutal nature of the whipping of those who resisted the activities of the Colorado River Irrigation Company, which, as reviewed above, instigated the seizure of the Indian lands by securing the appointment of the Commissioners.[18]

Corroborating the report of the meeting by the Commissioners in the Los Angeles jail with "Ex-Chief Miguel and eight Yuma Indians" is this excerpt from the statement:

"The Judge said that tomorrow I would be taken to Los Angeles to the County jail. They took me and locked me up. That same day I was arrested, eight more men were arrested. Four more besides me were whipped the twenty-five lashes, and four were not whipped. We all were sent to jail. The next day we were all sent to jail to Los Angeles. While we were in jail—about twenty days, the jailer

[15] Before the Indian Claims Commission Of The United States, Docket No. 320; Deposition of Patrick Miquel, Jack Kelly, John Cash, and Steven Kelly, taken at Fort Yuma, California, on Wednesday and Thursday, the 28th and 29th days of November, 1951, page 7, lines 10–20.

[16] Before the Indian Claims Commission Of The United States, Docket No. 320; Deposition of Patrick Miguel, etc., page 7, lines 21–23.

[17] Report of the Commission dated January 24, 1894, pages 5, 6.

[18] Report "Yuma Indian Reservation Re: Agreement of 1893, Yuma, Arizona—Oct. 7, 1935, The agreement of 1893 and how it was made." Signed, Walter Scott.

came over and told us that Government officials were there and wanted to see us. These men were Washington J. Houston, John A. Gorman, Peter R. Brady, and Bill Mohave an Indian. So we went over to see them all of us. Bill Mohave told us that these men wanted our names. Chief Miguel answered saying 'I am not going to give my name'. Peter Brady spoke up and said 'If you don't give me your name I am going to send all of you to San Quentin'. Chief Miguel spoke up again and said, 'We are in jail now, you can do as you please with us'.

"They kept us there for three months without a trial and turned us all loose. One died in jail on account of the whipping. We came home. When we came home again, the agreement of 1893 was already made in our absence."

It is noteworthy that the Commissioners did not secure the signature of Ex-Chief Miguel. They, in fact, only report that Miguel and those held in jail favored taking "their lands in allotments"; that they knew of the proposed canal "and hoped it would soon be built." Underscored is the gross misrepresentation used in entrapping the Quechans by asserting a canal would be built to irrigate their lands.

Jailing leaders of the Quechans, whipping some who resisted seizure of their lands, was only a part of the odious conduct of the Commissioners. The methods used in securing the marks of the Indians who purportedly signed the document and the inducements falsely stated to the Indians by the Commissioners is but a part of their crimes. This statement under oath is most important:

"*Q. Do you remember what was said [by the Commissioner] on the second [day].*

"A. The second day the same thing occurred only the old man stood on a chair and held up the proposed Agreement in his hand and said the Agreement is going to cut up your land into five-acre pieces and each man, woman and child will get five acres of land, free water will be given you, implements will be given you, seed will be given you, the land will be leveled, brush cleared, the land leveled and all you have to do is go out and farm it.

"*Q. Did he say who was going to pay for all of that?*

"A. The government was going to pay for all of that."[19]

Compulsion—the prime element in duress—was used by the Commission to secure marks to the Agreement of 1893, by the relcutant, illiterate Quechans. It was described by an eye witness as follows:

"* * * they began asking the Indians to come forward and sign. Nobody did and then he, Bill [Mojave], began to call out names of the Indians who were standing around and the most of them hesitated. Those who hesitated, two policemen—one called George Escalanti and another one called Chappo—went out, one on each side of the Indian, and brought him in as his name was called, brought him in to the table and when he comes to the table Dr. Heffernan would say 'What is your name'. Bill Mojave would give the name, that is the Indian, Bill Mojave, gave the name, and then Dr. Heffernan would hold the pen and the Indian just barely touched the tip of the pen and he made the sign after writing the name in." [20]

Witness Miguel's statements under oath were likewise repeated under oath by Witness Jack Kelly, evidencing the duress and coercion used to force the Indians to sign a document alleged to be the Agreement of December 4, 1893:

"*Q. Did you actually see whether anybody signed the paper from where you were?*

"A. Yes, I saw most of ones already signed all setting around there and from where I was I saw the others who were standing around there and asked them to come in and sign and that is what they did, they went after them and forced them to come in and sign."[21]

Further evidence of the duress and coercion practiced upon the Quechans is set forth in these terms:

"A. Yes, I saw those people who came here from Washington and they called a meeting with the Indians and I was present but I was quite aways and Bill Mojave was standing by the table and two officers, policemen, were there too and were calling Indians to come to the table to sign this document and of course some hesitated to go and they went after them and forced them to go to the table to sign, and they did not sign it but they forced them to sign and so when I saw that I just walked away (he made gestures showing how they forced them to sign)." [22]

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[19] Before the Indian Claims Commission Of the United States, Docket No. 320; Depostion of Patrick Miguel * * * page 7, lines 10-20.

[20] Before the Indian Claims Commission Of The United States, Docket No. 320; Deposition of Patrick Miguel * * * page 9, lines 13-25.

[21] Before The Indian Claims Commission Of The United States. Docket No. 320; Deposition of Jack Kelly * * * page 24, lines 19 thru page 25, line 7 and page 26, lines 20-26.

[22] Before The Indian Claims Commission Of The United States, Docket No. 320; Deposition of John Cash * * * page 28, lines 22 through page 29, line 5.

A paradox—Commissioners purportedly acting for a Trustee, forcing illiterate beneficiaries to sign away their future by affixing their marks to a document that they did not understand—probably never saw—because of studied deception and falsification by the purported agents of the Trustee.

(3) Forgery of Indians' names and marks; probably substitution of documents after signing must be added to crimes of fraud, duress and coercion perpetrated upon the Quechans in connection with the December 4, 1893, alleged agreement.

There is very strong evidence that the names of many of the Indians, signatures marks allegedly affixed to an alleged document, were forged. Forgery was committed in regard to the alleged witnessing of each signature by Bill Mojave. Reference in that regard is made to the alleged list of signatures to some document. Opposite the names on each page is the alleged signature of "Bill Mojave" witness to the alleged signatures evidenced by marks. Each signature is numbered 1 through 203. On the final page of the list of purported marks is the following:

"*Q. Did you see any meetings between the Commissioners and the Indians yourself?*

"A. Yes they had their meeting up the hill here and they wanted the Indians to sign this Agreement and some hesitated to sign and they forced them. They had to go after them and bring them to the table and sign.

"*Q. Who did that, who brought them up to the table?*

"A. They were Indian policemen.

"*Q. Just what did they do?*

"A. Yes, these Indian policemen just forced them. There were two of them and they just dragged them in, the officers were on each side of the Indians and dragged them in to force them to sign and the Indian hesitated but they forced to hold the end of the pen or whatever it was and someone has to make that mark for them.

* * * * * * *

"Bill Mojave. [signed] 198 Cal-E-cu-le-how his X mark.

"[Bill Mojave signed] 199 Bill Mojave his X mark."

In keeping with the crude deception practiced on the Quechans is the witnessing in long hand by Bill Mojave of his own mark evidencing his inability to write his name. Relative to Bill Mojave's inability to write his name is this sworn statement:

"A. * * * Bill Mojave would give the name, and then Dr. Heffernan would hold the pen and the Indian just barely touched the tip of the pen and he made the sign after writing the name in.

"*Q. Whose handwriting is this with the name?*

"A. Dr. Heffernan's all the way down, and even those crosses.

"*Q. They were all made by him too?*

"A. They were all made by him.

"*Q. Whose handwriting is this, his own name?*

"A. That is Bill Mojave's.

"*Q. Is that his handwriting?*

"A. That is written by Dr. Heffernan again, you can see that.

"*Q. You think Bill Mojave's was written by Dr. Heffernan also?*

"A. Yes.

"*Q. You are sure these Indian names were written by Dr. Heffernan and these marks?*

"A. Yes." [23]

Forging of the Quechan names from signature No. 119 to No. 203, the last mark on the purported list of signatures, is evidenced by statements under oath. Having recited the refusal of one of the Indians to sign, the witness Patrick Miguel states as follows:

"*Q. Did anybody else sign afterward on that day after the meeting?*

"A. No.

"*Q. What happened then?*

"A. It broke up when they saw what happened to this Indian when he refused, it started breaking up.

"*Q. Up to that point did you see anyone who signed?*

"A. Yes, Joseph Homer was the only one who signed voluntarily.

"*Q. When did he sign?*

"*A.* He signed just before this thing happened.

"*Q. Can you find his name on there and tell us what happened?*

"A. Joseph Homer—here it is right here No. 119.

[23] Before The Indian Claims Commission Of The United States, Docket No. 320; Deposition of Patrick Miguel * * *, p. 9, line 21 through p. 10, line 13.

"Q. There appear to be a total of 203 names on this document. Do you know what happened after that?

"A. Following Joseph Homer, my brother was called out. He was there with Joseph Homer so he was called out and he came over to the table and Dr. Heffernan says 'Here is a pen, you know how to write your name.' My brother said 'No, you have been writing all the other names, now you write my name' and Bill Mojave immediately gave my brother's name, Indian name, but I do not see it next to Joseph Homer's name.

"Q. Your brother's name does not appear?

"A. Doesn't appear there at all.

"Q. After that, did this incident occur when the Commissioner told the Indian it was all right for him to know what he was signing?

"A. No, this was before, somewhere down here after Joseph Homer and my brother came to the table this Indian was called out and he refused to sign and then is when the meeting broke up.

"Q. Do you know anything about the rest of the names, how they got on there, when they were put on there?

"A. Of course, I do not know that part but according to the testimony of Frank Cooper, a Quechan Indian, and his brother John Williams (they were both working here at the time at the Indian School—John Williams was a cook) and after he got through with his work he noticed the Commissioners were on the grounds yet and all the other officials, the Chief and Bill Mojave and the police, they saw them going over to Dr. Heffernan's office (that is in the middle of this row of buildings) so they went over also, these two Indian brothers they went over and the Commissioners said 'That that would not do at all, it is going to fail', and then it was that Bill Mojave supplied the rest of those names by calling them out and Dr. Heffernan wrote them down. Now that is the statement that John Williams made, it was in the evening after dark." [24]

Signatures of approximately 119 of the Quechans were obtained by fraud, duress and coercion. The names from 119 through 203—94 alleged marks—were obtained by fraud, duress, coercion and by forgery.

In the light of the conduct of the Commissioners, there is no basis for doubting forgery of the document. "Bill Mojave" purported to sign his certificate as interpreter. On cross-examination of Patrick Miguel this colloquy between the witness and opposing counsel ensued:

"Q. He [Bill Mojave] could not sign it?

"A. No.

"Q. Well this certificate at the end was 'Given under my hand at Ft. Yuma Reservation this 5th day of December A. D. 1893' and there appears a signature, Bill Mojave. You do not think he could sign his name? You don't think he could sign it?

"A. No sir. How could he sign his name, he had never been educated?

"Q. Do you know of your own knowledge who did sign the name Bill Mojave?

"A. No, I do not." [25]

Warranted here is reference to the fact that Federal lawyers opposing the Quechan claim subjected the witnesses whose depositions were taken as set forth above, to searching cross-examination. A review of the entire transcript in that connection is most instructive.

Forgery of the Agreement of December 4, 1893, by substitution of documents is a real probability. The names of the alleged signers 1–203 are on seven and a quarter pages with the first name at the top of page 1 of the signatures. In the light of the general fraud and deception practiced on the Quechans it is probable that the alleged document allegedly presented to the Quechans is not the same document to which the forged signatures were attached. Indeed, there is found in the files the Commission's "work agreement" which differs drastically from the "official" document. That "work agreement" has written into the alleged cession clause a proviso limiting it to lands "lying under the line of the proposed Colo River Irrigation Company's proposed canal."

From the files it is impossible to know what document was allegedly explained by the illiterate interpretor Bill Mojave to the illiterate Indians. What is known is this:

That Bill Mojave could neither read nor write is a proved fact hence his certificate is without meaning.

[24] Before the Indian Claims Commission Of The United States, Docket No. 320; Deposition of Patrick Miguel * * *, p. 11, line 10, through p. 13, line 5.

[25] Before the Indian Claims Commission Of The United States, Docket No. 320; Deposition of Patrick Miguel * * *, p. 16, lines 6 through 17.

(4) Void though the December 4, 1893 alleged agreement is due to the criminal acts upon which it was predicated, there has never been compliance with it or the Congressional enactment approving it; it was, indeed, violative of Congressional enactments respecting allotments

There has not been compliance with the Agreement of December 4, 1983, or the Act of Congress approving it.[26]

Provision is made in Article II that "Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and in adjoining sections five acres of land * * *." Funds were authorized by Congress to make surveys and to carry out the proviso allotting to the Yumas the lands in question.[27] There was never compliance with that provision of the Act of Congress. To be observed the agreement limiting the Quechans to five acres of land, while in keeping with the amorality of it, is clearly in violation of the General Allotment Act of 1887 as it was then in force.[28]

Article III of the agreement in the statute approving it implements the allotment proviso. Nine years after the alleged execution of the agreement of December 4, 1893, the then Commissioner by a letter dated January 2, 1902, reported to the Secretary of the Interior in part as follows:

> "* * * No allotments have thus far been made inasmuch as the Colorado River Irrigating Company failed to construct its canal, and nothing has been accomplished towards carrying out the agreement with the Indians than to have the reservation surveyed. A subdivisional plat thereof made by the General Land Office, is on file in this office." [29]

Total failure to perform is thus evidenced. After allotting the lands as provided by both the Agreement and the statute—to date the allotting as provided has not taken place—the Agreement then provided that "* * * all of the residue of said reservation which may be subject to irrigation, shall be disposed of * * *." (Article III) In accordance with Article IV the proceeds from the sale of the irrigable lands would be placed in the Treasury of the United States, to the credit of the Yuma Indians "with interest at five per centum" which moneys were to be used to pay for water charges, seeds, for implements and "for the education and civilization of said Yuma Indians." Article V provides for the patents which were never issued, for lands never allotted as provided by the Agreement and the Congressional Act approving it.

Prime "come-on" used by the Commissioners to trick the Quechans respecting the Agreement of 1893 was an illusory canal—never to be built—to be constructed by the Colorado River Irrigation Company. By the Congressional Act approving the Agreement with which there was never compliance, provision was made that the Irrigation Company "shall be required to begin construction of said canal through said reservation within three years from the date of the passage of this Act, otherwise the rights granted by the Act aforesaid shall be forfeited." [30]

It is essential to reiterate that the right-of-way granted by Congress was expressly conditioned upon the Colorado River Irrigation Company and being required to furnish "* * * the Indian occupants of the land situated on the lower side of the canal with water sufficient for all domestic and agricultural purposes and purposes of irrigation on such terms and under such rules and regulations as shall be prescribed by the Secretary of the Interior." [31]

Two important elements are presented by the last quoted excerpts: (a) The Indian lands below the canal were the lands involved—not the entire reservation; (b) If the canal was not built, all of the consideration upon which the alleged Agreement of 1893 was predicated would fail for, as reiterated throughout, it was the irrigation of their lands in which the Indians expressed their interest in "negotiating" with the Commissioners; it was the "gimmickry" relied upon by the Commissioners in practicing their deception upon the Indians.

Here is a chronicle of events taken from the letter dated January 2, 1902, from the Commissioner of Indian Affairs to the Secretary of the Interior above mentioned. It in part reveals that the proposed canal to irrigate the lands of the

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[26] See attached copy of Act of August 15, 1894, containing agreement and Congressional approval.

[27] 28 Stat. 286, 336 et seq.

[28] 24 Stat. 388:

> "To each head of a family, one-quarter of a section;
> "To each single person over eighteen years of age, one-eighth of a section;
> "To each orphan child under eighteen years of age, one-eighth of a section; and
> "To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section; * * *."

[29] Letter dated January 2, 1902, from Commissioner W. A. Jones of the Office of Indian Affairs, to the Secretary of the Interior, page 6.

[30] 28 Stat. 286, 336 et esq.

[31] 27 Stat. 456-7.

Quechans was, indeed, illusory and, being illusory, was never constructed. It comments upon the seizure of the lands of the Quechans through the Agreement of 1893 which failed totally from the standpoint of the promises to the Indians that their lands would be irrigated:

> "Under date of March 9, 1895, this office notified * * * Beatty, * * * of the Colorado River Irrigation Company, of the objections of the Department to the plat of the canal of said Company through the Yuma reservation, filed under the provisions of the Act of February 15, 1893." [32]

Three years were to elapse:

> "In a letter dated August 1, 1898, Mr. Beatty stated that it would be well to have the allotments made at an early date." [33]

In due course the ouster of the Colorado River Irrigation Company from the reservation came about, which, of course, effectively prevented the construction of the canal and just as effectively deprived the Quechans from obtaining the waters they were promised as a consideration for allegedly signing the December 4, 1893, Agreement. The ouster is described in these terms in the source last mentioned:

> "By Department letter of December, 2, 1898, this office was advised that the authority granted April 6, 1895 to John C. Beatty, of the Colorado River Irrigation Company, to erect a temporary building and corral on the reservation, was revoked, and that the removal of Mr. Beatty and all of his employes and property from the reservation was ordered. Under this order Mr. Beatty was given ninety days from the receipt thereof to remove his effects." [34]

There was thus a total failure to perform either the Agreement of December 4, 1893, or the Act approving it.

(5) *It is unconscionable to seize the Quechan lands as has been done in view of the total failure to perform in accordance with either the provisions of the December 4, 1893 Agreement or Act of Congress approving it*

Congress prescribed in detail the Nation's obligations in connection with the Agreement of December 4, 1893. There was a total and complete failure to carry any of the provisions of either the Agreement or the Act in question into effect. Seizure of the Quechan lands by agents purporting to act for the National Government is the only aspect of the alleged Agreement that was accomplished. That seizure is a clear violation of honesty and good conscience; it must not be tolerated. There is no basis in law for that seizure for Congress most assuredly did not authorize it.

(6) *Yuma Federal Reclamation Project and acts creating it have no relationship with the defunct December 4, 1893 Agreement*

Failure to perform the fraudulent and probably forged December 4, 1893 Agreement most assuredly ended a shameful page in history. A report dated November 27, 1901, relative to the Yuma Indian Reservation, eight years after the alleged signing of the 1893 Agreement—underscoring the total failure of compliance with it, stated: "* * * that the best thing for the Indians would be for the government to build a ditch and control the water for them * * *." [35]

From the same source this statement is taken: "In view of all the circumstances and in the light of experience had with the Colorado River Irrigating [sic] Company, it would seem that if anything is to be done for the Yuma Indians in the way of irrigation, the government should do it alone and not through the instrumentality of any ditch company." [36]

(7) *Ten (10) years after defunct Agreement of December 4, 1893, Reclamation attempted to develop projects on Yuma Reservation and others*

As reviewed above, eight years after the alleged signing of the December 4, 1893 Agreement, the Commissioner of Indian Affairs reviewed for the Secretary of the Interior, the total failure to perform any aspect of that Agreement, including the fact that the Colorado River irrigation Company was ousted from the Reservation, and recommended that the United States construct an irrigation system for the Quechans. Nine years later the Reclamation Act of June 17, 1902 [37] became law. Eleven years after the Agreement was allegedly signed the Congress, as part of the Appropriation Act for the fiscal year ending June 30, 1905, enacted a law

[32] Letter of January 2, 1902, Commissioner to Secretary, page 9.
[33] Ibid., page 9.
[34] Ibid., page 9.
[35] Letter January 2, 1902, Commissioner of Indian Affairs to Secretary, p. 10.
[36] Ibid., p. 11.
[37] 32 Stat. 388.

the objectives of which are stated as follows: "Reclamation and disposal of irrigable lands in Yuma and Colorado River reservations * * *." [38]

That Act does not lend validity to the defunct Agreement of December 4, 1893, which had its inception in fraud, duress, and coercion, and which in fact was never performed.[39] As will be reviewed, contrasts are sharp between the defunct agreement of 1893 and the Congressional authorization enacted eleven (11) years after the purported signing of the Agreement. Antecedent to that review this background for it must be presented:

> By that illicit Agreement the writing recites: "The said Yuma Indians, upon conditions hereinafter expressed [conditions never performed], do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following-described tract of country * * *" as described in the Executive Order dated January 9, 1884.

"SEC. 25. Reclamation and disposal of irrigable lands in Yuma and Colorado River reservations—Diversion of Colorado River—Allotment—Price per acre—Installment payments—Proceeds.—That in carrying out any irrigation enterprise which *may be undertaken under the provisions of the reclamation act of* June seventeenth, *nineteen hundred and two,* and which may make possible and provide for, *in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations* in California and Arizona, the Secretary of the Interior *is hereby authorized to divert the waters of the Colorado River* and to *reclaim, utilize,* and *dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain: Provided,* That there shall be reserved for and alloted to each of the Indians belonging on the said reservations five acres of the irrigable lands. The remainder of the lands irrigable in said reservations *shall be disposed of to settlers under the provisions of the reclamation act: Provided further,* That there shall be added to the charges required to be paid under said act by settlers upon the *allotted* [sic] Indian lands such sum per acre as, in the opinion of the Secretary of the Interior, *shall fairly represent the value* of the *unallotted lands in said reservations* before reclamation; said sum to be paid in annual installments in the same manner as the charges under the reclamation act. *Such* additional sum per acre when paid shall be used to pay into the relcamation fund the charges for the reclamation of *the said allotted lands,* and the remainder *thereof shall be placed to the credit of said Indians* and shall be expended from time to time under the direction of the Secretary of the Interior for their benefit."

To be observed is the fact that the alleged cession by the Quechans, if operative, would have destroyed the Reservation. Yet during the decade which was to elapse between the alleged signing of the 1893 Agreement and the Act of 1904, the Indians occupied the Reservation as described and the Department of the Interior proceeded upon the basis that the unperformed Agreement—fully in keeping with the law—did not deprive the Indians of their lands.

(*8*) *Contrasts between the 1904 Act pursuant to which Reclamation entered upon the Yuma Indian Reservation, and the alleged Agreement of 1893, require specific reference*

The Secretary of the Interior under the reclamation provision of the 1904 Act relative to the irrigable lands of the Quechans, was directed to "dispose of any lands * * * which may be irrigable by such works in like manner as though the same were a part of the public domain."

Eleven (11) years earlier the Quechans allegedly agreed that after allotments to "each and every member of said Yuma Indians" the lands "which may be subject to irrigation" shall be "regularly surveyed and to be subdivided into tracts of ten acres each" and those lands appraised by the Secretary. After survey and appraisal the Secretary "shall cause the said lands to be sold at public sale to the highest bidder for cash * * *." It is manifest that the public land laws pursuant to which the Quechan lands were to be sold under the reclamation proviso of the 1904 Act in no way related to the method of surveys, appraisal and sale as spelled out in Article III of the alleged 1893 Agreement. Under the 1904 reclamation proviso it is declared that from the irrigable lands to be sold by the Secretary "there shall be reserved for and allotted to each of the Indians belonging on the said reservations five aeres of the irrigable lands."

Secondly, it will be noted that the allotments provided for in the purported 1893 Agreement declared that "Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and in adjoining sections five

[38] 33 Stat. 189.

[39] Section 25 of Appropriation Act of April 21, 1904, ch. 1402, 33 Stat. 189, 224. Taken from Federal Reclamation Laws Annotated.

acres of land * * *." Quite obviously the Indians were not limited to their allotments on the Reservation but were *authorized to enter upon adjoining sections of land.* It is equally clear as the records of the Bureau of Indian Affairs disclose, that the 1893 arrangement contemplated that "Each and every" man, woman and child would be entitled to a five-acre allotment.

There have been contrasted above the widely disparate procedures for disposing of the Quechan lands under the 1904 enactment and the 1893 Agreement. Methods of sale and utilization of the proceeds derived from the sale of the Quechan lands are equally important. It is provided that, "The money realized by the sale" of the irrigable lands would be placed "in the Treasury of the United States, to the credit of the said Yuma Indians * * * with interest thereof at five per centum per annum * * *." (Article IV) Provision is then made that those funds would be subject to appropriation by Congress or "by order of the President, for the payment of water rents, building of levees, irrigating ditches, laterals, the erection and repair of building, purchase of tools, farming implements and seeds, and for the education and civilization of said Yuma Indians."

Again by way of contrast reference is made to the reclamation provision of the Act of 1904. There it is declared that the lands taken from the Quechans will be "disposed of to settlers under the provisions of the reclamation Act * * *." [40] That enactment likewise differs radically from the public auction provided for the sale of the lands purportedly taken from the Indians by the 1893 arrangement, and very clearly to their detriment as will be pointed out.

The settlers upon the Indian lands were required by the Act last cited, of 1904, to pay for those lands "* * * such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservation before reclamation * * *." Otherwise stated, the lands would not be sold on the basis of a fair market value which would necessarily include a valuation upon the immediate prospect of irrigation. Thus the price which would be paid by the settlers would be for raw desert land—at a price far below a fair market value of lands soon to be irrigated. Loss to the Quechans, under those circumstances, of necessity has been extremely high. Moreover, the settlers were to pay for the lands in "annual installments" as contrasted with the cash sales envisioned by the 1893 arrangement. A further loss to the Indians—particularly in view of the fact that the sums placed in the Treasury for them under the arrangement last mentioned would have drawn five percent interest per annum. Following that proviso it is declared in the 1904 Act that the sums collected in annual installments for the raw desert land sold to the settlers "shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit." As reviewed above, the Colorado River Irrigation Company was required by the Act of Congress granting the right-of-way across the Quechan Reservation to "* * * at all times * * * furnish the Indian occupants of the land situated on the lower side of the canal with water sufficient for all domestic and agricultural purposes and purposes of irrigation * * * on such terms and under such rules and regulations as shall be prescribed by the Secretary of the Interior." [41] Quite obviously the reclamation provision of the Act of 1904 would not only require the Indians to pay for the reclamation of their lands but that cost included the construction charges for the entire Yuma Reclamation Project.

The late Fulton W. Hoge who represented the Quechans before the Indian Claims Commission estimated that the Government retained between $50 and $60 an acre for Indian land "* * * to reimburse itself" for the Yuma Reclamation Project. Estimated loss to the Indians by this variance would run as high, according to Mr. Hoge, as $1,500,000. Mr. Hoge also emphasized that there are 8,000 acres of irrigable Quechan lands which were never sold although the National Government is occupying those lands at the present time. Here again it is obvious that irrespective of the harshness of the 1893 arrangement, the reclamation provision of the Act of 1904. as construed. was even more damaging to them.

Fourteen years subsequent to the alleged execution of the Agreement of 1893, the Acting Commissioner of Indian Affairs, by a letter dated January 4, 1907, wrote to the Superintendent at Fort Yuma relative to the allotments of Indian lands in connection with the Yuma Reclamation Project. In part the Superintendent was advised as follows:

[40] See Reclamation Act, June 17, 1902 (32 Stat. 388 et seq.) Secs. 3 and 5 respecting applicability of homestead laws which provided for entry upon and receipt of patent by settlers who complied with requirements but actually made no payment, or a most minimal payment for the land itself.

[41] 27 Stat. 456–7.

"* * * the lands which the Indians are to take should be selected in the near future, so that the Reclamation work will not be delayed. Under the circumstances, I think it advisable for you to call the Indians together, in such way as may be the custom for them to meet, and present to them the conditions which will prevail when their lands are allotted. Say to them that the Office wishes to have an expression of their views as to where they will take their lands, and that it is believed their interests will be best served by having their allotments together rather than scattered all over the Reservation. If they are willing to do this, let them have a reasonable opportunity to suggest sites for the proposed allotment and report the facts. Thereafter a representative of the Office will be directed to meet the representatives of the Reclamation Service, with view of looking over the situation and having everything made satisfactory to all concerned."

Annual reports by the Bureau of Reclamation contemporaneous with the vague comments respecting the allotment of lands within the Yuma Reclamation Project reveal the magnitude of the project as contrasted with the very small acreage of the Quechans which would be benefited by the development. [42] Significance must be ascribed to the last cited annual report written virtually a full generation after the defunct and unperformed alleged Agreement was allegedly signed by some of the Quechans:

"During the fiscal year [1911–1912] there were approximately 10,500 acres under cultivation [within the Yuma Reclamation Project]. About 2,500 acres were situated in the first unit opened for settlement on the Yuma Indian Reservation * * *." [43]

Under the heading "Settlement and Irrigation" the report continues:

"All but one of the 173 farm units opened on the Indian reservation in March, 1910, are occupied, the area at the present time under cultivation being about 2,500 acres. * * *" [44]

Magnitude of the injustice to the Quechans is well stated in the quoted excerpts. Their lands had been opened to settlement; water to irrigate those lands had been seized for the benefit of the non-Indian settlers while the Quechans, robbed of their properties, lived in dire poverty and distress.

(9) *Twenty (20) years after 1893 Agreement, some Quechan land allotted—not in accordance with Agreement*

A generation of poverty and degradation was experienced by the Quechans between the time when some of them were deceived or forced into signing the 1893 Agreement, and the allotment of some of their land was undertaken. From the certificate set forth below [45] there will be observed two salient facts: (a) The protracted and unconscionable delay in allotting the lands; (b) The fact they were not allotted pursuant to the Agreement or the Congressional Act approving it.

Significance must be ascribed to the fact that neither the defunct Agreement of 1893 nor the Act approving it were alluded to in regard to the lands actually allotted. Equally significant is the fact that there was not compliance with either the unperformed Agreement or the Act approving it. Rather, as reviewed above, the language of the 1904 Act—amended by the 1911 Act [46]—increasing the allotments to ten acres—governed.[47]

It is reiterated that the 1904 Act as amended, in express terms, related only to "irrigable land" under the Reclamation Act; that the Quechan lands sold under that Act would be used to "pay into the reclamation fund the charges for the reclamation of the" lands allotted to the Indians, which charges were part of those incurred for a vast reclamation project largely non-Indian. Contrast that with the Congressional requirement respecting the never-to-be-built canal of the Colorado River Irrigation Company that the Quechans would receive water "sufficient for

[42] Reports of Reclamation Service 1907–1908; 1911–1912.
[43] Report of Reclamation Service 1911–1912, p. 57.
[44] Report of Reclamation Service 1911–1912, p. 58
[45] Certificate of Second Assistant Commissioner of Indian Affairs, dated August 22, 1913, approved September 3, 1913 by First Assistant Secretary of the Interior:
"The foregoing schedule describing allotments numbered 1 to 809, inclusive, made by Special Allotting Agent Charles E. Roblin, and Superintendent Anna C. Egan to Indians on the Yuma Reservation, California, under the provisions of the Acts of April 21, 1904 (33 Stat. L., 224), and March 3, 1911 (36 Stat. L., 1058–1063), and under instructions from this Office dated November 1, 1911 (83712–1911), approved by the Department November 3, 1911; November 18, 1911 (94025–1911); and March 27, 1912 (27965–1912), is respectfully submitted to the Secretary of the Interior with the recommendation that he approve the allotments described therein except Nos. 32, 118, 119, 409 to 412, inclusive; 430 to 433, inclusive; 439; 553; 554; 555; 565 and 640, and that the Commissioner of the General Land Office be directed to cause trust patents to be issued in accordance with the provisions of the Act of February 8, 1887 (24 Stat. L., 388) as amended by the Act of May 8, 1906 (34 Stat. L., 182) for all of the allotments except those which contain irregular descriptions."
[46] 36 Stat. 224.
[47] See above.

all domestic and agricultural purposes and purposes of irrigation on such terms * * *" as the Secretary of the Interior would determine.[48] That Congressional enactment, when read in the light of the defunct 1893 Agreement and the fraudulent promises to the Quechans as to how their lands would be irrigated, dispels any merit in the argument that the reclamation project was in fulfillment of the provisions of the last mentioned Agreement. Important here is this fact: The Department of Justice makes that argument before the Indian Claims Commission in regard to the Quechan claims.

(10) Legislative history of 1904 Act proves that there is no relationship between it and the fraudulent Agreement of 1893

There have been reviewed the immense disparities between the fraudulent Agreement of 1893 and the 1904 Act as amended. An analysis of the legislative history is conclusive that Congress had no intention of robbing the Quechans of their lands. That history evinces a broad policy for reclaiming lands on the Colorado River Indian Reservation, the Yuma Indian Reservation and the Pyramid Lake Indian Reservation. Noted in that regard is the fact that Section 25, which relates to the Colorado River Indian Reservation and the Yuma Indian Reservation, *is identical* with Section 26 of the Act reviewed above, which relates to the Pyramid Lake Indian Reservation, with the exception that Section 25 refers to diversions from the Colorado River which does not, of course, pertain to the Pyramid Lake Indian Reservation.[49] Both Sections relate solely to irrigable lands under reclamation projects, not to the non-irrigable lands.

When Sections 25 and 26 were before the Senate for debate, it was proposed that the section relating to the Pyramid Lake Indian Reservation be amended by adding "or to any other reservation" to the end that all reservations would be benefited by the reclamation laws. From the Congressional Record the revulsion of the Senators to seizing all of the Indian lands is reflected, with the attendant withdrawal of the proposed amendment:

"Mr. PLATT of Connecticut. If I understand this provision, it proposes, where Indians are on reservations which are irrigable and are to be irrigated, to give them five acres of land only and to dispose of all the rest of the land in the reservation to settlers and pay the result into the reclamation fund.

"Mr. STEWARD. Yes.

"Mr. PLATT of Connecticut. Now, if the Senate desires to do that, these amendments are properly drawn to accomplish that purpose.

"Mr. SPOONER. *And that without consulting the Indians.*

"Mr. PLATT of Connecticut. I so understand.

"Mr. HANSBROUGH. I did not understand that section 17 [passed as Section 26] gives such authority. I read the provision hastily, and it occurred to me that if we were going to extend the reclamation law to any particular reservation it would be well to have a general provision extending to all of the reservations. Of course, if the Senator from Connecticut thinks this disposes of lands in all these reservations belonging to the Indians I shall withdraw the amendment, for I have no desire to do that.

"Mr. STEWART. I think you had better withdraw it.

* * * * * * *

"Mr. PLATT of Connecticut. There is this in favor of the amendment—that these lands, until they are irrigated, are worth nothing. It is not like taking agricultural lands away from the Indians and allowing them nothing for them. There is that distinction between desert lands and agricultural lands. Now, the amendment does, as I understand it, take away from the Indian upon any reservation which is irrigated all except 5 acres.

"Mr. HANSBROUGH. I think the Senator from Connecticut is correct in his reading of the amendment, and I withdraw my amendment in order not to complicate the matter.

"Mr. DUBOIS. Does the Senator withdraw the amendment?

"The PRESIDING OFFICER. The Senator withdraws the amendment. The question is on agreeing to the amendment of the committee [Sections 25 and 26 as passed].

"The amendment was agreed to." [50] (Emphasis supplied)

Nowhere in the legislative history of the Act of 1904 is there evidence that the Congress acted in reliance upon the alleged Agreement of 1893; that it considered the cession of *all* of the Quechan lands, irrigable and non-irrigable. Rather the

[48] 27 Stat. 456-7.
[49] 33 Stat. 224-225.
[50] Congressional Record for March 23, 1904, page 3563.

whole course of that legislative history was that the reclamation projects—relating only to irrigable lands—would be authorized on the Colorado River, the Yuma and Pyramid Lake Indian Reservations.

In the communication dated January 23, 1904, the Director of the United States Geological Survey, prior to establishment of the Reclamation Bureau—explained the objectives and background of the then proposed Act of 1904, making applicable the Reclamation Act of 1902 to the Yuma and Colorado River Indian Reservations. Excerpts from that letter are set forth below.[51]

From those excerpts it is clear that the activities being conducted were pursuant to the Reclamation Act of 1902; that the objective of the 1904 legislation pertained to the Colorado River Indian Reservation as well as to the Yuma Indian Reservation, both of which Reservations were so situated that they could benefit from the use of Colorado River water. In the review of the 1893 Agreement it will also be noted that the communication in question sets forth in some detail the differences between the sale of the land for application to the reclamation fund and the disposition to be made of lands at public auction pursuant to the 1893 arrangement. It will also be noted in the communication that water was to be delivered under the arrangement last mentioned "for irrigating the lands of the Indians at such rates as may be fixed by the Secretary of the Interior" and not pursuant to the Reclamation Act.

The report likewise emphasized that the Colorado River Irrigation Company had failed to construct the canal, all as reviewed above. It must also be emphasized that the entire thrust of the communication to the Congress was on the basis that Yuma Indian Reservation was in existence and not that it had been ceded to the United States pursuant to the provisions of the fraudulent 1893 arrangement.

"Irrigation of Yuma and Colorado River Indian Reservations, Arizona and California

January 23, 1904.

"Sir: In pursuance of the engineering investigation and surveys which for the last two years have been diligently prosecuted on the Colorado River in both California and Arizona, under the provisions of the reclamation act of June 17, 1902 (32 Stat. 388), this Office is approaching the point where it will probably be ready to recommend the constructuion of certain works on the river for the irrigation and reclamation of lands along its valleys as part of a comprehensive system of utilizing the waters of the river to the best possible advantage.* * *

"As the reclamation act requires the return to the reclamation fund of the money spent for the irrigation of lands, the large areas in Indian reservation involved in these projects can not be utilized without special authority from Congress. There are, approximately, 23,000 acreas of irrigable land in the Colorado River Indian Reservation.

"An agreement was made December 4, 1893, with the Yuma Indians for the disposition of the lands in their reservation. Said agreement was approved by act of Congress of August 15, 1894. (28 Stat., 286–332.) Under the provisions of this act it was proposed to allot to each Indian 5 acres of irrigable lands, the remainder to be surveyed and appraised and sold at public auction at not less than the appraised value, after giving due notice of such sale by publication in the newspapers.

"It was also provided that the Colorado River Irrigating Company , which was granted a right of way through the said reservation under the act of February 15, 1893 (27 Stat., 456), should furnish water for irrigating the lands of the Indians at such rates as may be fixed by the Secretary of the Interior. This irrigating company was required to begin the construction of the canal through the reservation within three years from the passage of the act of 1894. This Office is informed that the company has done no work whatever upon the reservation looking toward the construction of the canal.

"It is understood that under the decisions of the United States Supreme Court, in the cases of Cherokee Nation v. Hitchcock (187 U.S., 294) and Lone Wolf v. Hitchcock (187 U.S., 553), Congress has full power to dispose of the Indian lands in such manner as it may consider best fitted for the benefit of the Indians.

"The lands in these Indian reservations are of no practical value without irrigation, and only a very small part could ever be sold in the absence of the certainty of irrigating them. * * *"

[51] Senate Report No. 1660, 58th Cong., 2d sess., Indian Appropriation Bill, Mar. 21, 1904, p. 28.

(11) Construction of the 1904 Act by the Supreme Court discloses objective of it

A search of the law reveals that the Supreme Court has analyzed the 1904 Act as follows: "The purpose was not to prescribe or regulate the means to be employed to divert water from the Colorado *but to extend the reclamation law to the Indian reservations named.* It was merely to empower the Secretary, ift he circumstances stated should arise, to reclaim lands in these reservations by use of water to be taken from the river. The authority granted was no more than permission to appropriate them for the purpose specified." [52] It is quite evident that the Supreme Court did not view the Yuma Indian Reservation as having been destroyed—transferred in its entirety to the United States. *Rather, as stated, the objective of the 1904 Act as amended was to reclaim irrigable land within a then existing reservation.*

(12) Rejection of Solicitor's opinions as being an attempt without basis in law, to meld the fradulent and unperformed Agreement of 1893 with the Reclamation Act of 1902 and the Act of 1904 as amended

Illegal, unconscionable, fradulent nature of the 1893 Agreement has been documented. Failure to perform that Agreement is a matter of public record fully recognized. Hence it is unfitting and unworthy of representatives of the United States to assert that the Quechan lands can be seized and occupied for the benefit of the Nation for its unjust enrichment, to the continuing irreparable damage of the Indians.

On that background the Solicitor's opinion dated January 8, 1936, will be reviewed. It arose by reason of the construction of the All-American Canal across the Yuma Indian Reservation. This Bureau and the Quechans properly sought compensation for the seizure of the lands for the Canal. Tone, temper, procedure and practices giving rise to Indian losses throughout Western United States of almost three-quarters of a century are recited in the Solicitor's opinion in these terms as major features of the contest for the Quechan lands:

"After some negotiations between the bureaus [Indian Affairs and Reclamation] on July 15, 1935 the Commissioner of the Bureau of Reclamation advised the Commissioner of Indian Affairs that the land taken for right of way for the All-American Canal was not susceptible to irrigation, *that title to non-irrigable land was vested in the United States by virtue of the act of August 13, 1894 (28 Stat. 332)*, that the land constituted a part of the public domain, and that, therefore the Yuma Indians had no interest in the land." [53]

Omitted entirely from the Solicitor's opinion is mention of the promises made to the Indians that the Colorado River Irrigation Company would build a canal to irrigate their lands; of the failure of performance in that regard; the fraud, forgery, and duress practiced upon the Indians. Omitted likewise is reference to this fact: Congress granted a right-of-way to the Colorado River Irrigation Company conditioned upon irrigating Indian lands below the proposed canal which was never to be built; Congress placed a forfeiture clause in the grant to the Colorado River Irrigation Company; that the right-of-way for the canal was indeed forfeited. Gravest error of the Solicitor's opinion is this predicate which is the crux of it: Conditions allegedly beneficial to the Indians were spelled out in the Agreement and by the Acts of Congress, none of which was fulfilled. Nevertheless, there is ascribed to the Congress and to the United States the willingness to profit through an immoral contract while at the same time imposing gravest hardships upon the Indians. This concept, so deeply rooted in error, must be rejected by both this Bureau and the Indians.

Research has failed to reveal a single authority which upholds an agreement void in its inception by reason of forgery, fraud and duress where, as here, there has been no performance by the United States. That the concept of the validity of the Agreement was not adopted by the Department of the Interior until the seizure of Quechan lands was consummated for the construction of the All-American Canal, is demonstrated by this excerpt from the opinion:

"* * * It is urged by the Indian Office that the non-irrigable lands have been continuously administered as a part of the Indian Reservation since execution and ratification of the agreement; that the lands have been leased for grazing and mining purposes; and that the proceeds from such leases have been covered into the Federal Treasury for the benefit of the Yuma Indians." [54]

In the light of the facts admitted in the last cited excerpt and the documented facts relating to the forgery, fraud, and lack of performance of the defunct 1893 Agreement, it is essential that the Bureau of Indian Affairs and the Quechans se-

[52] United States v. Arizona, 295 U.S. 174, 184 (1934).
[53] Solicitor's Opinion M 28198, page 5.
[54] Solicitor's Opinion M 28198, pages 10 and 11.

cure a decision by a tribunal of competent jurisdiction as to the document's validity. Any doubt as to the need for that decision is removed when consideration is directed to the course adopted in rendering the opinion.

This all-pervasive error is adhered to in the opinion:

"The 1893 Agreement and the 1904 Act as amended by the Act of March 3, 1911, are, without legal support, in some manner related; that the Reclamation laws supplemented the void and unperformed Agreement of 1893—that concept must be rejected as being contrary to fact; there is no basis for it in law and Congress *did not* take action to relate the fraudulent Agreement with the Reclamation Act, all as reviewed above." [55]

Without purporting any legal analysis to relate the 1893 Agreement to the Reclamation laws—it could not be done—the Solicitor's opinion attained the end in disregard of the law, fact and history. For example, in error it is said: "It [the agreement of 1893 and the Act of 1894] directed the Secretary of the Interior to allot the lands susceptible to irrigation until each and every Indian had received an allotment and to appraise and sell the remaining irrigable lands to white settlers. * * * Each of the Indians on the Yuma Reservation was allotted as directed by the Act of Congress of August 15, 1894. and March 3, 1911, *supra*, and the remaining irrigable lands were appraised and sold at public sale." [56] That statement is factually and legally incorrect, for

1. The lands were not allotted pursuant to the 1894 Act or the Agreement of 1893; they were allotted in accordance with the certificate of allotments discussed above; [57]

2. The lands were not sold at public auction as provided for in the Agreement, but disposed of pursuant to the 1904 Act as amended by the 1911 Act, as public domain and most assuredly not to the highest bidder at the market price as contemplated by the 1893 Agreement; [58]

3. The remaining irrigable lands were not sold—large areas of irrigable land—indeed, irrigated lands, all as observed on the ground—have not been sold. Moreover, as reviewed above, 8,000 acres of irrigable Quechan lands were never sold; [59]

4. The conflicts between the fraudulent Agreement of 1893 and the language of the 1904 Act as amended by the 1911 Act, are irreconcilable as to (a) the lands to which they pertained; (b) the disposition to be made of the proceeds; (c) the costs to the Indians for the reclamation of the lands; (d) circumstances pursuant to which water would be delivered to the Indians.[60]

Another totally incorrect and gravely misleading statement in the Solicitor's opinion—in keeping with the legally unacceptable premise that the fraudulent Agreement of 1893 is related to the Act of 1904 as amended by the Act of 1911—is this which pertains to the Yuma Reclamation Project: "Article 11 of the agreement provides, among other things, that 'Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and in adjoining sections five acres of land, which shall be allotted to such Indian in severalty.' (The area in the irrigable allotment was increased to ten acres of irrigable land by the act of March 3, 1911 (36 Stat. 1063)." [61]

It is reiterated: There is no basis for the statement that the 1911 Act in any way related to the 1893 Agreement, and the Indians are gravely damaged by that attempted melding of the two foreign features of this problem.

Routine research would have disclosed facts not mentioned in the Solicitor's opinion in regard to the non-irrigable lands. For example, the opinion discusses at some length Article I of the fraudulent Agreement of 1893. In all probability that Article is a forgery. As discussed above, the names of many of the alleged siginatories were forged and those names, with those obtained by compulsion, were attached to *a* document submitted to the Congress. It will be recalled that the commissioners who negotiated the fraudulent Agreement, stated to the Quechans that the lands to be ceded were below the illusory canal which they were told soon would be built by the Colorado River Irrigation Company. At no time were the Quechans told that there would be a cession of all their lands. [62]

In the absence of at least mention of that fact and the cognizance of the odorous probability that the entire document was a forgery, the Solicitor's opinion in

[55] See above. Yuma Reclamation Project and Acts creating it have no relationship with the defunct December 4, 1893 Agreement, et seq.
[56] Solicitor's Opinion M 28198, pages 8, 9.
[57] See above.
[58] See above.
[59] See above.
[60] See above.
[61] Solicitor's Opinion M 28198, page 7.
[62] See above, (1) Fraud, etc., et seq.

question should not merit consideration. More important, however, is the fact that the non-irrigable land continues to be held by the United States, for as the 1935 opinion states: ". . . However, at no time have the non-irrigable lands been opened to settlement and sale by proclamation of the President as provided in the above quoted paragraph of the Act of August 1894." [63]

Thus it is plain that although the Quechans were promised payment for their non-irrigable land, they have not been paid and the United States continues to retain the land. That being the situation, the unconscionable retention of the lands under the fraudulent and probably forged document becomes more manifest. It is, moreover, to be noted in passing that the reference is made interchangeably to the fraudulent Agreement of 1893 and to the ". . . Act of August 1894." What is never stated—and should have been—is the fact that the Act and the Agreement are one and the same as evidenced by the Act itself. Quite possibly the interchanging has been adopted to strengthen the tenuous opinion that would cause an investiture of title in the United States after nearly a half century during which time, as stated above, no one had previously recognized that the Agreement was operative, much less valid.

In the ultimate it makes no difference whether the fraudulent Agreement or the Act of 1894 are relied upon to reach the Solicitor's erroneous conclusions relative to the title to the Quechan lands for these reasons:

"Neither that Agreement nor the Act can be related legally to the construction of the Yuma Reclamation Project or the 1904 Act as amended, which provided for the allotment to the Indians of 10 acres of irrigable land and the disposal of "irrigable" lands to "settlers under the provisions of the reclamation act" or the payment to the Indians for the unallotted "irrigable" lands at a value "before reclamation." None of the provisions of the 1904 Act as amended relates to the fraudulent 1893 Agreement. Hence it has no application and the 1904 Act as amended is an independent taking of Quechan land for which they are entitled to just compensation at the date of the taking. Title to all remaining land still resides in the Quechans."

As the entire Solicitor's opinion is predicated upon errors of both law and fact, as stated, it must be withdrawn.

(13) Solicitor's memorandum of June 12, 1968 to the Secretary of the Interior is clearly in error both as to fact and law and should be withdrawn [64]

Involved in the Solicitor's memorandum of June 12, 1968, are accretions to both irrigable and non-irrigable lands within the Yuma Indian Reservation. Conclusions based upon the same errors of fact and law which pervade the 1936 opinion reviewed above, are expressed. That memorandum purports to determine Quechan interests in the lands. Nature of the errors of fact and law in that memorandum is disclosed by this excerpt from it:

"At the time the 1894 act was passed, it was contemplated that irrigation facilities would be constructed by a private company. That venture failed. Thereupon, in 1904 Congress made provision for the inclusion of irrigable lands of the Yuma reservation in the Yuma Federal Reclamation project being undertaken pursuant to then recently enacted Reclamation Act of June 17, 1902 (32 Stat. 388)."

The "Thereupon" in the quoted excerpt is a gratuitous attempt to relate two totally unrelated events involving both fact and law. The fraudulent 1893 Agreement, as repeatedly declared above, had no relationship whatever to the 1904 Act as amended by the 1911 Act. That is clear from the language of the 1904 Act which differs very greatly from the express language and intentment of the Agreement in question.

In keeping with the errors of that memorandum is the declaration made by the Commissioner of Reclamation in an attachment to it dated April 3, 1968. There the then Reclamation Commissioner asserts, among other things, that because some of the lands are subject to flooding they are non-irrigable. That statement is contrary to fact.

Because of the errors in the memorandum of June 12, 1968, which have been reviewed, this Bureau and the Quechans should demand the withdrawal of it.

The conclusions and recommendations are set forth as part of the summary and index to which this memorandum is attached.

WILLIAM H. VEEDER,
Water Conservation and Utilization Specialist.

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[63] Solicitor's Opinion M 28198, page 9.
[64] Status of land in T. 16 S., R. 22 and 23 E., SBM Proposal for lease to Yuma County, Arizona.

ACT OF AUGUST 15, 1894, CHAP. 290 (28 STAT. 286 *** 336)

An Act Making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department for the year ending June thirtieth, eighteen hundred and ninety-five, and fulfilling treaty stipulations with the various Indian tribes, namely:

* * * * * * *

Agreement With The Yuma Indians in California.

Agreement with Yuma Indians for cession of lands in California.—Sec. 17. Whereas Washington J. Houston, John A. Gorman, and Peter R. Brady, duly appointed commissioners on the part of the United States, did on the fourth day of December, eighteen hundred and ninety-three, conclude an agreement with the principal men and other male adults of the Yuma Indians in the State of California, which said agreement is as follows:

Articles of agreement made and entered into this 4th day of December, A.D. 1893, at Fort Yuma, on what is known as the Yuma Indian Reservation, in the county of San Diego, State of California, by Washington J. Houston, John A. Gorman, and Peter R. Brady, commissioners on the part of the United States appointed for the purpose, and the Yuma Indians.

ARTICLE I

Lands ceded.—The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following-described tract of country in San Diego County, Cal., established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows:

Location.—"Beginning at a point in the middle of the channel of the Colorado River, due east of the meander corner to sections nineteen and thirty, township fifteen south, range twenty-four east, San Bernardino meridian; thence west on the line between sections nineteen and thirty to the range line, between townships twenty-three and twenty-four east; thence continuing west on the section line to a point which, when surveyed, will be the corner to sections twenty-two, twenty-three, twenty-six, and twenty-seven, in township fifteen sourth, range twenty-one east; thence south on the line between sections twenty-six and twenty-seven, in township fifteen south, range twenty-one east, and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections thirty-four and thirty-five, in township sixteen south, range twenty-one east; thence easterly on the international boundary to the middle of the channel of the Colorado River; thence up said river, in the middle of the channel thereof, to the place of beginning, be, and the same is hereby, withdrawn from settlement and sale and set apart as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided, however,* That any tract or tracts included within the foregoing-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded out of the reservation hereby made.

"It is also hereby ordered that the Fort Yuma military reservation be, and the same is hereby, transferred to the control of the Department of the Interior, to be used for Indian purposes in connection with the Indian reservation established by this order, said military reservation having been abandoned by the War Department for military purposes."

ARTICLE II

Allotments in severalty to Indians.—Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and in adjoining sections five acres of land, which shall be allotted to such Indian in severalty. Each member of said band of Indians over the age of eighteen years

shall be entitled to select his or her land, and the father, or, if he be dead, the mother, shall select the land herein provided for each of his or her children who may be under the age of eighteen years; and if both father and mother of the child under the age of eighteen years shall be dead, then the nearest of kin over the age of eighteen years shall select and locate his or her land; or if such persons shall be without kindred, as aforesaid, then the Commissioner of Indians Affairs, or some one by him authorized, shall select and locate the land of such child.

ARTICLE III

Allotting.—That the allotments provided for in this agreement shall be made, at the cost of the United States, by a special agent appointed by the Secretary of the Interior for the purpose, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and within sixty days after such special agent shall appear upon said reservation and give notice to the said Indians that he is ready to make such allotments; and if anyone entitled to an allotment hereunder shall fail to make his or her selection within said period of sixty days then such special agent shall proceed at once to make such selection for such person or persons, which shall have the same effect as if made by the person so entitled; and when all of said allotments are made and approved, then all of the residue of said reservation which may be subject to irrigation, except as hereinafter stated, shall be disposed of as follows: The Secretary of the Interior shall cause the said lands to be regularly surveyed and to be subdivided into tracts of ten acres each, and shall cause the said lands to be appraised by a board of three appraisers, composed of an Indian inspector, a special Indian agent, and the agent in charge of the Yuma Indians, who shall appraise said lands, tracts, or subdivisions, and each of them, and report their proceedings to the Secretary of the Interior for his action thereon; and when the appraisement has been approved the Secretary of the Interior shall cause the said lands to be sold at public sale to the highest bidder for cash, at not less than the appraised value thereof, first having given at least sixty days' public notice of the time, place, and terms of sale, immediately prior to such sale, by publication in at least two newspapers of general circulation; and any lands or subdivisions remaining unsold may be reoffered for sale at any subsequent time in the same manner at the discretion of the Secretary of the Interior, and if not sold at such second offering for want of bidders then the Secretary of the Interior may sell the same at private sale at not less then the appraised value.

ARTICLE IV

Proceeds of sales.—That the money realized by the sale of the aforesaid lands shall be placed in the Treasury of the United States, to the credit of the said Yuma Indians, and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress, or to application, by order of the President, for the payment of water rents, building of levees, irrigating ditches, laterals, the erection and repair of buildings, purchase of tools, farming implements and seeds, and for the education and civilization of said Yuma Indians.

ARTICLE V

Trust patents to allottees.—Upon the approval of the allotments provided for herein by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patents shall be of legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or in case of his or her decease, to his or her heirs or devisees, according to the laws of California, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs or devisees, as aforesaid in fee, discharged of said trust and free of all incumbrance whatsoever.

Conveyances forbidden.—And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. And during said period of twenty-five years these allotments and improvements thereon shall not be subject to taxation for any purpose, nor subject to be seized upon any execution or other legal process, and the law of descent and partition in force in California shall apply thereto.

ARTICLE VI

Lands open to settlement.—All lands upon said reservation that can not be irrigated are to be open to settlement under the general land laws of the United States.

ARTICLE VII

Indian school reserved.—There shall be excepted from the operation of this agreement a tract of land, including the buildings, situate on the hill on the north side of the Colorado River, formerly Fort Yuma, now used as an Indian school, so long as the same shall be used for religious, educational, and hospital purposes for said Indians, and a further grant of land adjacent to the hill is hereby set aside as a farm for said school; the grant for the school site and the school farm not to exceed in all one-half section of three hundred and twenty acres.

ARTICLE VIII

Ratification.—This agreement shall be in force from and after its approval by the Congress of the United States.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

WASHINGTON J. HOUSTON, [SEAL].
JOHN A. GORMAN, [SEAL].
PETER R. BRADY, [SEAL].
Commissioners on the part of the United States.
BILL MOJAVE, and others.

Agreement confirmed.—Therefore, be it

Enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

Appropriation for allotting.—That for the purpose of making the allotments provided for in said agreement, including the payment and expenses of the necessary special agent hereby authorized to be appointed by the Secretary of the Interior, and for the necessary resurveys, there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the sum of two thousand dollars, or so much thereof as may be necessary.

Expenses of survey and sale.—That for the purpose of defraying the expenses of the survey and sale of the lands by said agreement relinquished and to be appraised and sold for the benefit of said Indians, the sum of three thousand dollars, or so much thereof as may be necessary, be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the same to be reimbursed to the United States out of the proceeds of the sale of said lands.

Right of way to Southern Pacific Railroad Company.—That the right of way through the said Yuma Indian Reservation is hereby granted to the Southern Pacific Railroad Company for its line of railroad as at present constructed, of the same width, with the same rights and privileges, and subject to the limitations, restrictions, and conditions as were granted to the said company by the twenty-third section of the Act approved March third, eighteen hundred and seventy-one, entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes:" *Provided,* That said company shall, within ninety days from the passage of this Act, file with the Secretary of the Interior a map of said right of way, together with a relinquishment by said company of its right of way through said reservation as shown by maps of definite location approved January thirty-one, eighteen hundred and seventy-eight.

Sale of irrigable lands at auction.—The Secretary of the Interior is hereby authorized and directed to cause all the lands ceded by said agreement which may be susceptible of irrigation, after said allotments have been made and approved, and said lands have been surveyed and appraised, and the appraisal approved, to be sold at public sale, by the officers of the land office in the district wherein said lands are situated, to the highest bidder for cash, at not less than the appraised value thereof, after first having given at least sixty days' public notice of the time, place, and terms of sale immediately prior to such sale, by publication in at least two newspapers of general circulation, and any lands or subdivisions remaining unsold may be reoffered for sale at any subsequent time in the same manner, at the discretion of the Secretary of the Interior, and if not sold at such second offering for want of bidders, then the Secretary may cause the same to be sold at private sale at not less than the appraised value. The money realized from

the sale of said lands, after deducting the expenses of the sale of said lands, and the other money for which provision is made for the reimbursement of the United States, shall be placed in the Treasury of the United States to the credit of said Yuma Indians, and shall draw interest at the rate of five per centum per annum, and said principal and interest shall be subject to appropriation by Congress, or to application by the Preisdent of the United States for the payment of water rents, the building of levees, irrigating ditches and laterals, the purchase of tools, farming implements, and seeds, and for the education and civilization of said Indians; *Provided, however,* That none of said money realized from the sale of said lands, or any of the interest thereon, shall be applied to the payment of any judgment that has been or may hereafter be rendered on claims for damages becuase of depredations committed by said Indians prior to the date of the agreement herein ratified.

Lands open under general laws.—That all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws.

Irrigating canal construction.—That the Colorado River Irrigating Company, which was granted a right of way for an irrigating canal through the said Yuma Indian Reservation by the Act of Congress approved February fifteenth, eighteen hundred and ninety-three, shall be required to begin the construction of said canal through said reservation within three years from the date of the passage of this Act, otherwise the rights granted by the Act aforesaid shall be forfeited.

Water rents.—That the Secretary of the Interior shall have authority from time to time to fix the rate of water rents to be paid by the said Indians for all domestic, agricultural, and irrigation purposes, and in addition thereto each male adult Indian of the Yuma tribe shall be granted water for one acre of the land which shall be allotted to him, if he utilizes the same in growing crops, free of all rent charges during the period of ten years, to be computed from the date when said irrigation company begins the delivery of water on said reservation.

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